

THE PROBLEMS OF DOUBTFUL PARENTHOOD (NASAB)
RELATING TO CHILDREN IN ISLAMIC LAW

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IN THE NAME OF GOD, THE MOST
COMPASSIONATE, THE MOST MERCIFUL

DECLARATION

I, THE UNDERSIGNED, HEREBY MAKE A SOLEMN DECLARATION THAT THIS THESIS IS WRITTEN BY ME AND ANY REFERENCE MADE TO THE WORKS IS DULY ACKNOWLEDGED.

MOHAMAD M.B.SUJIMON

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ABSTRACT

This study deals with the treatment of children of doubtful parenthood (*nasab*) in Islamic law. Chapter I deals with family relationship by analysing the doctrine of *al-walad li al-firāsh*, problematic intercourse (*waṭ' shubhah*) and *al-bayyinah*. Chapter II analyses the concept of illegitimacy which comprises three categories namely *zinā*, *li'ān* and deliberate marriage with women of prohibited degree. This chapter has also attempted to clarify the legal and religious provisions regarding the *walad zinā*. Chapter III focuses on the treatment of the abandoned child (*laqīṭ*). It comprises a definition of the *laqīṭ* and an inquiry into the reasons for the abandonment of the child, the rule (*ḥukm*) governing finding the abandoned child and the legal status of the abandoned child. This chapter also covers the child's religious status, doubts about the child's legitimacy and the financial sources for the upbringing and care of the abandoned child. In addition, there is an examination of the institution of *walā'* to see how it might be applied to the foundling. The means by which the foundling could acquire its *nasab* has been analysed in chapter four. In this chapter the doctrine of *istilhāq* or *iqrār* as an alternative to adoption has been examined. In cases where dispute about paternity arises physiognomy (*al-qiyāfah*) and drawing lots (*qur'ah*) are used. The Conclusion summarizes and resolves the various discussions of the thesis. There is an appendix which deals with the way the problems discussed in the thesis are dealt in Malaysia as far as Muslims are concerned.

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NOTES ON transliteration

In general, the system of transliteration of Arabic words used in this thesis is the same as has been employed by the *Encyclopaedia of Islām* (second edition) with a few minor but common variations; k, dh, dj, kh, sh and th rendered as q, dh, j, sh and th. Certain well-known word, proper names, and titles have been rendered in Westernised forms. As against the *Encyclopaedia*, *ta marbūṭah* () has throughout been retained and shown by ending 'h' instead α or t, as the case of construct state.

ع = ' (alif ma'adha)	ض = d (dal)
ا = α (alif)	ط = t (ṭā)
ب = b (bā)	ظ = z (ẓā)
ت = t (tā)	ع = c (ayn)
ث = th (ṭhā)	غ = gh (ghayn)
ج = j (jīm)	ف = f (fā)
ح = h (ḥā)	ق = q (qāf)
خ = kh (khā)	ك = k (kāf)
د = d (dāl)	ل = l (lām)
ذ = dh (dhāl)	م = m (mīm)
ر = r (rā)	ن = n (nūn)
ز = z (zā)	ه = h (hā)
س = s (sīn)	و = w (wāw)
ش = sh (shā)	ي = y (yā)
ص = ṣ (ṣād)	


Long Vowels


 = ā


 = ū

 = ī

Short Vowels


 = a


 = u


 = i

Diphthongs

 = aw

 = ay

 iyy (final form ī)

 uww (final form ū)

LIST OF ABBREVIATIONS

The following is a list of the abbreviations used for the works most frequently referred to in the footnotes.

Abū Zakariyyā al-Anṣārī, Matn al-Minhāj = Abū Zakariyyā al-Anṣārī, Matn al-Minhāj printed together with Abū Zakariyyā b. Sharaf al-Nawawī, Minhāj al-Tālibīn wa ʿUmdat al-Muftīn

Aḥmad al-Ṣāwī, Bulghat al-Sālik = Aḥmad b. Muḥammad al-Ṣāwī, Bulghat al-Sālik li-Aqrab al-Masālik ilā Madhhab al-Imām Mālik

Al-Bahūtī, Kashshāf al-Qināʿ = Manṣūr b. Yūnus b. Idrīs al-Bahūtī, Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ

Al-Bājūrī, Hāshiyat al-Bājūrī = Al-Shaykh Ibrāhīm al-Bājūrī, Hāshiyat al-Bājūrī ʿalā Ibn Qāsim al-Ghazzī

Al-Bayhaqī, al-Sunan al-Kubrā = Abū Bakr Aḥmad b. al-Husayn b. ʿAlī al-Hāfiz al-Bayhaqī, al-Sunan al-Kubrā

Al-Bijirmī, Bijirmī ʿalā al-Khaṭīb = Muḥammad b. Muḥammad Aḥmad al-Shirbīnī al-Khaṭīb, Mughnī al-Muḥtāj ilā Maʿrifat Maʿānī Alfāz al-Minhāj

Al-Burhānpūrī, Kanz al-ʿUmmāl = al-Muttaqī al-Hindī al-Burhānpūrī, Kanz al-ʿUmmāl

Al-ʿAsqalānī, Fath al-Bārī = Aḥmad b. ʿAlī b. Ḥajar, al-ʿAsqalānī, Fath al-Bārī bi-Sharḥ Saḥīḥ al-Bukhārī.

ʿUmar ʿAbd Allāh, Aḥkām al-Sharīʿah = ʿUmar ʿAbd Allāh, Aḥkām al-Sharīʿah al-Islāmiyyah fi Aḥwāl al-Shakhṣiyyah

Al-Dārimī, Sunan al-Dārimī = Abū Muḥammad ʿAbd Allāh b. ʿAbd al-Raḥmān b. al-Faḍl b. Bahrām al-Dārimī, Sunan al-Dārimī

Al-Dhahabī, al-Aḥwāl al-Shakhṣiyyah = Muḥammad Ḥusayn al-Dhahabī, al-Aḥwāl al-Shakhṣiyyah bayn Madhhab Ahl al-Sunnah wa-Madhhab al-Iʿfariyyah

Al-Dimashqī, Kifāyat al-Akhyār = Taqy al-Dīn Abū Bakr b. Muḥammad al-Ḥusaynī al-Ḥuṣnī al-Dimashqī, Kifāyat al-Akhyār fī Ḥallī Gāyat al-Ikhtisār

Al-Dusūqī, Hāshiyat al-Dusūqī = al-ʿAllāmah Shams al-Dīn al-Shaykh

Muḥammad ʿArafah al-Dusūqī, Hāshiyat al-Dusūqī ʿalā al-Sharḥ al-Kabīr

E.I. = *The Shorter Encyclopaedia of Islam*

E.I.¹ = *The Encyclopaedia of Islam*, first edition.

E.I.² = *The Encyclopaedia of Islam*, new edition.

F.H.Ruxton, Maliki Law = F.H.Ruxton, Maliki Law - Being a Summary from French Translation of the Mukhtaṣar of Sīdī Khalīl

Hāshiyat Qalyūbī = Shihāb al-Dīn Aḥmad b. Aḥmad b. Salāmah al-Qalyūbī, Hāshiyatān Qalyūbī wa ʿUmayrah

Hāshiyat ʿUmayrah = Shihāb al-Dīn Aḥmad al-Barlasī ʿUmayrah, Hāshiyatān Qalyūbī wa ʿUmayrah

Al-Ḥaṭṭāb, Mawāhib al-Jalīl = Abū Bakr Muḥammad b. Muḥammad b. ʿAbd al-Raḥmān al-Ḥaṭṭāb al-Maghribī, Kitāb Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalīl

Ibn Abī Zayd, Bākūrat al-Saʿd = Ibn Abū Zayd, Bākūrat al-Saʿd, translated by Alexander David Russel and A. al-Maʾmūn Suhrawardy, First Steps in Muslim Jurisprudence

Ibn Qayyim, ʿIlām al-Muwaqqāʿīn = Ibn Qayyim al-Jawziyyah, ʿIlām al-Muwaqqāʿīn ^{can} Rabb al-ʿAlāmīn

Ibn Qayyim, Zād al-Maʿād = Ibn Qayyim al-Jawziyyah, Shams al-Dīn Abū Bakr ʿAbd Allāh Muḥammad b. Abī Bakr al-Zarʿī al-Dimashqī, Zād al-Maʿād fi Hudā Khayr al-ʿIbād

Ibn al-Najjār, Muntahā al-ʾIrādāt = Taqī al-Dīn Muḥammad b. Aḥmad al-Futūhī al-Ḥanbalī Ibn al-Najjār, Muntahā al-ʾIrādāt fī Jamʿ al-Muqniʿ maʿa Tanqīḥ wa Ziyādāt

Ibn Rushd, Bidāyat al-Mujtahid = Abū al-Walīd Muḥammad b. Aḥmad b. Muḥammad b. Aḥmad Ibn Rushd al-Ḥafīd al-Andalusī al-Qurṭubī, Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid

Ibn Qāsim al-Ghazzī, Sharḥ Matn al-Shaykh Abū Shujāʿ = Ibn Qāsim al-Ghazzī, Sharḥ Matn al-Shaykh Abū Shujāʿ printed in the margin of Ibrāhīm b. Muḥammad b. Aḥmad al-Bājūrī, Hāshiyat al-Bājūrī ʿalā Sharḥ Ibn Qāsim al-Ghazzī

Ibn Qayyim, al-Turuq al-Hukmiyyah = Ibn Qayyim al-Jawziyyah, al-Turuq al-Hukmiyyah fi al-Siyāsah al-Shar'iyah

Ibn Qudāmah, al-Mughnī = Abū Muḥammad °Abd Allāh b. Aḥmad b. Muḥammad b. Qudāmah al-Maqdisī, al-Mughnī

Ibn Rajab, al-Qawā'id = Abū al-Faraj °Abd al-Raḥmān Ibn Rajab al-Ḥanbali, al-Qawā'id fi al-Fiqh al-Islāmī

Al-Ikhtiyārat al-Fiqhiyyah = °Alā' al-Dīn Abū al-Ḥasan °Alī b. Muḥammad b. °Abbās al-Ba'ī al-Dimashqī, al-Ikhtiyārat al-Fiqhiyyah min Fatāwā Shaykh al-Islām Ibn Taymiyyah

Jawād °Alī, al-Mufaṣṣal fi Tarīkh = Jawād °Alī, al-Mufaṣṣal fi Tarīkh al-°Arab Qabl al-Islām.

Jawād °Alī, Tarīkh al-°Arab = Jawād °Alī, Tarīkh al-°Arab Qabl al-Islām

Al-Jaṣṣāṣ, Aḥkām al-Qur'ān = Abū Bakr Aḥmad b. °Alī al-Jaṣṣāṣ, Aḥkām al-Qur'ān

Al-Jazīrī, Kitāb al-Madhāhib = °Abd al-Raḥmān al-Jazīrī, Kitāb al-Fiqh °alā al-Madhāhib al-Arba'ah

Al-Kahlānī, Subul al-Salām = Muḥammad b. Ismā'īl al-Ṣan'ānī al-Amīr al-Kahlānī, Subul al-Salām - Sharḥ Bulūgh al-Marām of al-Ḥāfiẓ Shihāb al-Dīn Abī al-Faḍl Aḥmad b. °Alī b. Muḥammad b. Ḥajar al-Kinānī al-°Asqalānī al-Qāhirī

Al-Kasānī, Badā'i' al-°Sanā'i'c = °Alā' al-Dīn Abū Bakr b. Mas'ūd al-Kāsānī, Badā'i'c al-°Sanā'i'c fi Tartīb al-Shārā'i'c

Al-Kashnāwī, Ashal al-Madārik = Abū Bakr b. Ḥasan al-Kashnāwī, Ashal al-Madārik Sharḥ Irshād al-Sālik fi Fiqh Imām al-A'immaḥ Mālik

Al-Khaṭīb, al-Iqnā'c = Shams al-Dīn Muḥammad Shirbīnī al-Khaṭīb, al-Iqnā'c fi ḥalli alfāẓ Abī Shujā'c

Lā'ihat Majallat al-Aḥkām al-Shar'iyah = Lā'ihat Majallat al-Aḥkām al-Shar'iyah Mustamaddat min Uṣūl al-Madhhabayn al-Ḥanafī wa al-Mālikī

M.Zayd al-Abyānī, Sharḥ al-Aḥkām = Muḥammad Zayd al-Abyānī, Mukhtaṣar Sharḥ al-Aḥkām al-Shar'iyah fi al-Aḥwāl al-Shakhṣiyyah

Al-Maqdisī, al-°Uddah Sharḥ al-°Umdah = Bahā' al-Dīn °Abd al-Raḥmān Ibrāhīm al-Maqdisī, al-°Uddah Sharḥ al-°Umdah

Al-Mardāwī, al-Insāf = al-Faqīh °Alā al-Dīn Abī al-Ḥasan °Alī b. Sulaymān al-Mardāwī, al-Insāf fī Ma°rifat al-Rājiḥ min al-Khilāf °alā Madhhab al-Imām al-Mubajjal Aḥmad Ibn Ḥanbal

Al-Marghīnānī, al-Hidāyah = Shaykh al-Islām Burhān al-Dīn °Alī b. Abī Bakr al-Marghīnānī, al-Hidāyah

Al-Mawāq, al-Tāj wa-al-Iklīl = Abū °Abd Allāh Muḥammad b. Yūsuf b. Abī al-Qāsim al-°Abd Rabbī, al-Tāj wa al-Iklīl li-Mukhtaṣar Khalīl

Muḥammad Aḥmad al-Ṣāliḥ, al-Tifl fī al-Shari°ah al-Islāmiyyah = Muḥammad Aḥmad al-Ṣāliḥ (Dr.), al-Tifl fī al-Shari°ah al-Islāmiyyah - Tanṣi'atuhu, Ḥayātuh, Huqūq al-latī Kafalahā al-Islām

Musnad Aḥmad Ibn Ḥanbal = Aḥmad Ibn Ḥanbal, al-Musnad, edited by Aḥmad Muḥammad Shākir

Muḥammad Fīhr Shaqafah, Sharḥ al-Aḥkām = Muḥammad Fīhr Shaqafah, Sharḥ Aḥkam al-Aḥwāl al-Shakhsiyyah li al-Muslimīn wa al-Naṣārā wa al-Yahūd

Muwaffaq al-Dīn, °Umdat al-Fiqh = Muwaffaq al-Dīn Ibn Qudāmah, °Umdat al-Fiqh °alā Madhhab al-Imām Aḥmad b. Ḥanbal

Al-Nafrāwī, al-Fawākih al-Dawānī = al-Shaykh Aḥmad b. Ghunaym b. Sālim b. Muḥannā al-Nafrāwī, al-Fawākih al-Dawānī Sharḥ Risālat Abī Muḥammad °Abd Allāh b. Abī Zayd °Abd al-Raḥmān al-Qayrawānī al-Māliki

Q. al-Qur'ān (after Q. is the name of sūrah. The first figure shows the number and the sūrah and second figure shows the verse, e.g. Q. 2 (al-baqarah):33.

Al-Qayrawānī, al-Risālah = °Abdullah b. Zayd al-Qayrawani, Matn al-Risālah

Qāḍi Abū Yūsuf, Kitāb al-Āthār = Abū Yūsuf Ya°qūb b. Ibrāhīm al-Anṣārī, Kitāb al-Āthār

Al-Qurtubī, Tafsīr al-Qurtubī = Abū °Abd Allāh Muḥammad b. Aḥmad al-Anṣārī al-Qurtubī, al-Jāmi° li-Aḥkām al-Qur'ān

Al-Ramlī, Nihāyat al-Muḥtāj = Shams al-Dīn Muḥammad b. Abū al-°Abbās Aḥmad b. Ḥamzah b. Shihāb al-Dīn al-Ramlī, Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāfi al-Fiqh °alā Madhhab al-Imām al-Shāfi°ī

Al-Ṣan°ānī, al-Muṣannaf = Abū Bakr °Abd al-Razzāq b. Hammām al-Ṣan°ānī, al-Muṣannaf

Al-Shāfi'ī, al-Umm = Abū °Abd Allāh Muḥammad b. Idrīs Shāfi'ī, al-Umm

Al-Shawkānī, Nayl al-Āwtār = Muḥammad b. °Alī al-Shawkānī, Nayl al-Āwtār

Al-Shaybānī, Kitāb al-Āthār = Abū °Abd Allāh Muḥammad b. al-Ḥasan al-Shaybānī, Kitāb al-Āthār

Al-Shirāzī, al-Muḥadhdhab = Abū Ishāq Ibrāhīm b. °Alī b. Yūsuf al-Shirāzī al-Fayruzabādī, al-Muḥadhdhab fī al-Fiqh al-Shāfi'ī

Al-Shirbīnī al-Khatīb, Mughnī al-Muḥtāj = Muḥammad b. Muḥammad Aḥmad al-Shirbīnī al-Khatīb, Mughnī al-Muḥtāj ilā Ma°rifat Ma°ānī Alfāz al-Minhāj

Al-Sijistānī, Sunan Abī Dā°ūd = Abū Dā°ūd Sulaymān b. al-Ash°ath al-Azdī al-Sijistānī, Sunan Abī Dā°ūd, ed. Muḥammad Muḥy al-Dīn °Abd al-Ḥamīd

Al-Suyūṭī, Tanwīr al-Ḥawālik = Jalāl al-Dīn °Abd al-Raḥmān al-Suyūṭī, Tanwīr al-Ḥawālik

Al-Suyūṭī, al-Jāmi° al-Ṣaghīr = °Abd al-Raḥman Jalāl al-Dīn b. Abī Bakr al-Suyūṭī, al-Jāmi° al-Ṣaghīr fī Aḥādīth al-Bashīr al-Nadhīr

Ṣaḥnūn, al-Mudawwanat al-Kubrā = Ṣaḥnūn b. Sa°īd al-Tanawkhī, al-Mudawwanat al-Kubrā li al-Imām Mālik b. Anas

Shalabī, Ahkām al-USrah = Muḥammad Muṣṭafā Shalabī, Ahkām al-USrah fī al-Islām - Dirāsah Muqāranah bayn Fiqh al-Madhāhib al-Sunniyyah wa al-Madhab al-Ja°farī wa al-Qānūn

Sunan al-Nasā°ī = Abū °Abd al-Raḥmān b. Shu°ayb, Sunan al-Nasā°ī with commentary from al-Suyūṭī Zahr al-Rabā °alā al-Mujtabā

Sunan al-Tirmidhī = Abū °Isā Muḥammad b. °Isā b. Sawrah al-Tirmidhī, Sunan al-Tirmidhī

Ṣaḥīḥ Muslim = Muslim b. al-Ḥajjāj al-Qushayrī, al-Jāmi° al-Ṣaḥīḥ

Ṣāliḥ °Abd al-Samī° al-Azhari, Jawāhir al-Iklīl = Ṣāliḥ °Abd al-Samī° al-Azhari, Jawāhir al-Iklīl - Sharḥ Mukhtaṣar al-°Allāmah al-Khalīl

Ṣubḥī Maḥmaṣṣānī, Turāth al-Khulafā' = Ṣubḥī Maḥmaṣṣānī, Turāth al-Khulafā' al-Rāshidīn fī al-Fiqh wa al-Qaḍā'

Ṣubḥī Maḥmaṣṣānī, al-Mabādi' al-Shar°iyyah = Ṣubḥī Maḥmaṣṣānī, al-Mabādi' al-Shar°iyyah wa al-Qānūniyyah

The Majallah = Mohammed Kadri Pasha, Mohammedan Personal Law According to the Hanafite School

Al-Taḥāwī, Mukhtaṣar al-Taḥāwī = Abū Jaʿfar Aḥmad b. Muḥammad b. Salāmah al-Taḥāwī, Mukhtaṣar al-Taḥāwī

Al-Tahānāwī, Kitāb Istīlāḥāt = al-Tahānāwī, Kitāb Kashshāf Istīlāḥāt al-Funūn

Al-Turkumānī, al-Jawhar al-Naqī = ʿAlā al-Dīn b. ʿAlī b. ʿUthmān al-Mārdīnī Ibn al-Turkumānī, al-Jawhar al-Naqī

Al-Ṭabarī, Tafsīr al-Ṭabarī = al-Ṭabarī, Jāmiʿ al-Bayān ʿan Taʾwīl Āy al-Qurʾān.

Uri Rubin, al-walad li al-firāsh = Uri Rubin, al-walad li al-firāsh on the Islamic Campaign against zinā

Al-Zaylaʿī, Tabyīn al-Ḥaqāʾiq = al-ʿAllāmah Fakhr al-Dīn ʿUthmān b. ʿAlī al-Zaylaʿī, Tabyīn al-Ḥaqāʾiq Sharḥ Kanz al-Daqāʾiq

Al-Zuhaylī, al-Fiqh al-Islāmī = Wahbah al-Zuhaylī, al-Fiqh al-Islāmī wa Adillatuh

Al-Zurqānī, Sharḥ al-Zurqānī = Sīdī Muḥammad al-Zurqānī, Sharḥ al-Zurqānī ʿalā Muwaṭṭaʾ al-Imām Mālik

INTRODUCTION

This thesis attempts to clarify the treatment of children resulting from doubtful parenthood in classical Islamic law. This will be done through a close examination of the work of classical jurists. There are no specific sections in the works of the jurists devoted to this topic. Their discussions are scattered within a number of different sections and this is the first work to endeavour to bring these scattered references into a coherent systematic study of the whole subject. In particular such discussions are to be found in the chapters in the legal works on *nikāḥ* (marriage) and *ṭalāq* (divorce) but they are by no means restricted to these two chapters.

As the title makes clear, this study deals with the problem of children about whose parenthood there may be doubts. In other words, it concerns what rights and duties these children have in Islamic society according to the understanding of the classical jurists. Some of the evidence which the jurists produce belongs to the earliest period of Islām and therefore could be described, in a limited sense, as historical. However, that is the only historical aspect of this thesis. No attempt has been made to analyse later developments in the law on this subject in terms of social history. Although this would be extremely interesting, it is outside the scope of the thesis which is a study of the

legal position, not a socio-historical study. Nonetheless, where it has been possible to allude to this matter, some attempt has been made.

In order to discuss the problem of children of doubtful parentage, the thesis will examine how the children's legitimacy is established. This will be dealt in Chapter 1. Chapter 2 will deal with the problems that arise for those children who are known to be illegitimate and Chapter 3 examines the problem of children whose legitimacy is unknown, i.e. it is not known whether such children are legitimate or illegitimate. This refers to the foundling (*laqīṭ*). It will be seen that Islamic law provides a means for establishing their legitimacy on some occasions. However, before discussing these topics, it is necessary to examine the term *nasab* (parentage or blood relationship) of the child which has important legal implications for him/her, not only as a child but also later when he/she attains adulthood.

I. *Nasab*

In Islamic law, genealogy, parentage or lineage (*nasab*) usually refers to the biological descent of a child from its father. However, it is also applied sometimes to descent from the mother, particularly for the illegitimate child. Occasionally the term is employed in a larger sense to embrace other

relationships.¹ In this thesis nasab will be understood in the technical legal sense of the relationship of the parents with children born in consequence of their union.² Thus nasab in Muslim family law is a direct blood relationship.³ The establishment of a child's nasab as belonging legally to his/her father was very important in Islamic law. Not only did it establish that the child should be regarded as legitimate, it also established, for that reason, the child's place firmly within the family. The child had rights of maintenance and care (ḥaḍānah) from his or her father. Although it is the mother who has the responsibility to carry out the care for the child in its early years, the father will have the financial responsibility for ensuring that such care can be adequately carried out. He is responsible for the payment for the child to be suckled by an outsider and the mother, if she suckles the child herself, can claim some appropriate fee from her husband.⁴ The father of the offspring (when a girl), would be her walī to arrange marriage for her; the father of the offspring would be the ʿāqilah to pay the bloodwit on his/her behalf; the father of the offspring would be the walī to demand diyāh or qisās on his/her behalf. In addition, there would be rights for the prescribed share of inheritance at the death of the father or other prescribed

¹Neil B.E. Baillie, *A Digest of Moohummudan Law*, p. 391, cf; Thomas Patrick Hughes, *Dictionary of Islam*, pp. 430-431.

²Tanzil ur-Rahman, *A Code of Muslim Personal law*, vol. I, p. 689.

³Ṣubḥī Maḥmaṣṣānī, *Turāth al-Khulafāʾ*, p. 367.

⁴Al-Khaṭīb, *al-Iqnāʿ*, pp. 489-493, see also the commentary by al-Shaykh ʿIwāḍ and al-Bājūrī, printed in the margin of al-Khaṭīb, *al-Iqnāʿ*, pp. 489-493, cf; Muwaffaq al-Dīn Ibn Qudāmah, *ʿUmdat al-Fiḥ*, pp. 108-109.

heirs within the group established by the nasab. In addition, the child whose nasab was derived from his/her father had a valid social status in society whereas the offspring that could not trace his/her nasab from his/her father was subject to disadvantages in terms of both his/her legal position and of the prejudices of society.

In pre-Islamic times the means of establishing nasab or paternity through marriage are set in a famous Tradition reported by ʿĀishah in which she says:

"There were four types of marriage during the pre-Islamic period of ignorance (jāhiliyyah). One type was similar to that of the present day, i.e. a man used to ask somebody else for the hand of a girl under his guardianship or for his daughter's hand, and give her mahr and then marry her. The second type was that a man would say to his wife after she had become clean from her period, "Send for so and so and have sexual relation with him". Her husband would then keep away from her and would never sleep with her till she got pregnant from the other man with whom she was sleeping. When her pregnancy became evident, her husband would sleep with her if he wished. Her husband did so (i.e. let his wife sleep with some other man) so that he might have a child of noble breed. Such marriage was called al-istibdāʿ^c. Another type of marriage was that a group of less than ten men would assemble and enter a woman, and all of them would have sexual relations with her. If she became pregnant and delivered a child and some days had passed after her delivery, she would send for all of them and none of them could refuse to come, and then when all gathered before her, she would say to them, "You all know what you have done, and now I have given birth to a child. So it is your child, O so-and-so!" naming whoever she liked, and her child would follow him and he could not refuse to take him. The fourth type of marriage was that many people would have intercourse with a woman and she would never refuse anyone who came to her. Those were the prostitutes who used to fix flags at their doors as signs, and he who wished, could have sexual intercourse with them. If anyone of them got pregnant and delivered a child, then all those men would be gathered for her and they would call the qāʾifs (person skilled in

recognizing the likeness of a child to his father - physiognomists) to them and would let her child follow the man (whom they recognized as his father) and she would let him adhere to him and be called his son. The man could not refuse all that. But when Muḥammad was sent with the truth, he abolished all the types of marriage in the pre-Islamic period of ignorance except the type of marriage the people recognize today".⁵

Thus, we see that nasab from the father became restricted in Islamic law to a marriage that was valid according to the requirement of Islamic law. The main basis for these was that the person was eligible to be married and a proper contract was made involving a walī and two witnesses together with a dower (*mahr*). The implications of this will be discussed in the course of the thesis.

II. Review of the Literature

The primary source of this study is, of course, the Qur'ān. The translation of the Qur'ān used in the study is that of ʿAbdullah Yūsuf ʿAli (The Islamic Foundation, Leicester, 1975). However, changes were made to verses quoted from it whenever it seemed necessary for the sake of elucidation and precision of meaning.

Other primary sources which have been used in the study were the ḥadīth or Traditions of the Prophet Muḥammad which is based on al-kutub al-sittah, i.e.

⁵Ṣaḥīḥ al-Bukhārī, vol. VII, pp. 44-46.

al-Bukhārī, Muslim, Abū Dā'ūd, al-Tirmidhī, al-Nasā'ī and Ibn Mājah. Other than those al-kutub al-sittah, a few popular books of Traditions like al-Muṣannaf by 'Abd al-Razzāq al-Ṣan'ānī (d.211AH), al-Musnad by Aḥmad b. Ḥanbal (d.241AH), Sunan al-Dārimī by al-Dārimī (d. 255AH), Sharḥ Bulūgh al-Marām by Ibn Ḥajar al-'Asqalānī (d. 852AH), al-Jāmi' al-Ṣaḡhīr by al-Suyūṭī (d. 911AH), Kanz al-'Ummāl by al-Muttaqī al-Hindī (d. 975AH), Subul al-Salām by Ismā'īl al-Kaḥlānī, (d. 1182AH) and Nayl al-Awtār by al-Shawkānī (d.1255AH) have also been used.

The classical books of fiqh of the four schools of law, Mālikī, Ḥanafī, Shāfi'ī and Ḥanbalī, as well as the views of their followers are referred to throughout this thesis. The bulk of the legal works consulted belong to the later mediaeval period in Islām. The researcher has also used the Ottoman Majallat al-Aḥkām, the first attempt to codify Islamic law. The researcher has done this because it is, in effect, a codification of the legal opinions of the later Ḥanafite school of law. For this, the researcher has used the English translation of The Code of Mohammedan Personal Law by Mohammed Kadri Pasha translated by (Sir) Wasey Sterry and N. Abcarius, printed for the Sudan Government, London 1914 and the English Translation by Nawab A.F.M Abdur Rahman, Institutes of Mussalman Law, Calcutta 1917. The researcher has consulted Lā'ihat Majallat al-Aḥkām al-Shar'īyyah Mustamaddat min Uṣūl al-Madhhabayn al-Ḥanafī wa al-Mālikī - Qism Aḥkām al-Aḥwal al-Shakhṣiyyah, Tunis, n.d. which is a

comparative study of Mālikī and Ḥanafī legal opinions. I have also consulted contemporary works written on Islamic law in general. These works include al-Jazīrī, al-Fiqh ʿalā al-Madhāhib al-Arbaʿah and Wahbah al-Zuhaylī, al-Fiqh al-Islāmī wa Adillatuh.

The specific subject of Islamic family law in general written by contemporary writers have also been consulted. Among them are the works written by the following writers. ʿAbd al-ʿAzīz ʿĀmir, al-Aḥwāl al-Shakhṣiyyah fī al-Sharīʿah al-Islāmiyyah Fiqhan wa Qaḍāʾan; ʿUmar ʿAbd Allāh, al-Aḥkām al-Sharʿiyyah fī al-Aḥwāl al-Shakhṣiyyah; Aḥmad al-Kabīsī, al-Aḥwāl al-Shakhṣiyyah; Aḥmad Ibrāhīm Bek, al-Aḥkām al-Sharʿiyyah li-al-Aḥwāl al-Shakhṣiyyah; al-Ḥāj Ḥamdī al-Aʿẓamī, al-Muḥāḍarāt fī al-Aḥwāl al-Shakhṣiyyah; Muḥammad Zakariyyā al-Bardīsī, al-Aḥwāl al-Shakhṣiyyah; Muḥammad Fīhr Shaqafah, Sharḥ Aḥkām al-Aḥwāl al-Shakhṣiyyah li al-Muslimīn, wa al-Naṣārā wa al-Yahūd; Muḥammad Abū Zahrah, al-Aḥwāl al-Shakhṣiyyah; Muḥammad Muḥy al-Dīn ʿAbd al-Ḥamīd, al-Aḥwāl al-Shakhṣiyyah fī al-Sharīʿah al-Islāmiyyah; Muḥammad Zayd al-Abyānī Bek, Sharḥ al-Aḥkām al-Sharʿiyyah fī al-Aḥwāl al-Shakhṣiyyah and Muḥammad Yūsuf Musā, Aḥkām al-Aḥwāl al-Shakhṣiyyah fī al-Fiqh al-Islāmī.

Some modern works have also been importance references for this study. In particular, the work of Reuben Levy, The Social Structure of Islām, Cambridge

Universty Press, 1957; Patricia Crone, *Roman Provincial and Islamic Law*, Cambridge University Press, 1975; ʿAbd al-Karīm Zaydān, *Aḥkām al-Laḡīṭ fī al-Sharīʿah al-Islāmiyyah* in *Majmūʿah Buḥūth Fiqhiyyah*, (The Rule of the Foundling in Islamic law - a compilation of Research in Islamic Law), published by Mu'assasat al-Risālah, Beirut, 1986, pp. 351-374; Maryām Aḥmad al-Dāgistānī, *Aḥkām al-laḡīṭ fī al-Islām*, published by al-Maṭbaʿat al-Islāmiyyah al-Ḥadīthah, first edition, 1992; Ḥammūdah ʿAbd al-ʿĀṭī, *The Family structure in Islam*, Brentwood: International Graphics Printing, 1977; Muḥammad b. Aḥmad al-Ṣāliḥ, *al-Ṭīfl fī al-Sharīʿah al-Islāmiyyah*, published by Maṭābiʿ al-Farazdaq al-Tijāriyyah, al-Malīz, The Kingdom of Saudi Arabia, pp. 145-167 n.d. have been examined.

Further, Etan Kohlberg has written an article entitled, "The position of the walad zinā in Imami Shiʿism", published by Variorum, 1991, pp.237-266; Uri Rubin's 'al-walad li-al-firāsh' on the Islamic campaign against 'zinā' published by Studia Islamica LXXVIII G.P. Maisonnneuve-Larose, 1994, pp. 5-26 have also been examined.

CHAPTER ONE

LEGITIMACY: AL-WALAD LI-AL-FIRĀSH

The majority of Muslim and non-Muslim scholars of Muslim family law have identified the mode of affirming a legitimate *nasab* under the doctrine the child belongs to the bed (*al-walad li-al-firāsh*). This normally comes about through either a valid marriage (*nikāh ṣaḥīḥ*) or concubinage (*milk al-yamīn*). However, there are other means accepted by Islamic law as coming within the terms of the doctrine.⁶

The legal maxim *al-walad li-al-firāsh* implies that the paternity of the child is established by a marital relationship which existed at the time of the birth of the child. Thus the husband of the wife is assumed to be the father of the child if the marriage has taken place before the child's birth and still exists. In this respect the maxim assumes that legitimate intercourse has taken place between the couple after a valid (*ṣaḥīḥ*) marriage or an irregular (*fāsid*) marriage or sometimes even a void (*bāṭil*) marriage. The maxim also applies to a child born

⁶See for example, Robert Roberts, *The Social Laws of the Qur'ān*, p. 51, cf; Ibn. Qayyim, *Zād al-Ma'ād*, pp. 113-121, cf; Ibn Qayyim, *al-Turuq al-Hukmiyyah*, pp. 288-313, cf; Ibn Qudāmah, *al-Mughnī*, vol. V, pp. 699-707, cf; D.F. Mulla, *Principles of Mahomedan Law*, *op.cit.*, pp. 477-8; cf; Faiz Badruddin Tyabji, *Muhammadian Law - The Personal Law of Muslims*, pp. 264-5; Syed Ameer Ali, *Student's Handbook of Mahomedan Law*, p. 78; Muḥammad Abū Zahrah, *Family Law*, in Majid Khadduri and Herbert J. Liebesny (eds.), *Law in the Middle East*, pp. 152-3; Neil B.E. Baillie, *A Digest of Moohummadan Law*, p. 408; al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VII, p. 691; F.H. Ruxton, *Maliki Law*, p. 207, cf; al-Dhahabī, *al-Aḥwāl al-Shakhṣiyyah*, p. 339; M. Shalabī, *Aḥkām al-Uṣrah*, p. 696.

to a slave-woman whom the owner of the slave recognizes to be his child.

Islamic law considers that marriage contracts are classified into three categories: (i) nikāḥ ṣaḥīḥ - i.e. a valid marriage which fulfils all the conditions of marriage; (ii) nikāḥ fāsid, an irregular marriage when one or more of the technical requirements have not been fulfilled; (iii) nikāḥ bāṭil, a marriage which has taken place in serious contradiction to the major requirements of marriage in Islamic law. This marriage is regarded as null and void. The form of marriage which has been contracted affects the nasab of the child. Clearly a child born in a nikāḥ ṣaḥīḥ would normally be regarded as legitimate on the basis of the doctrine of al-walad li-al-firāsh.⁷ Some of the Ḥanafī scholars maintain that if any woman gives birth through a marriage which is ṣaḥīḥ or fāsid, the child of such a marriage would be considered automatically as legitimate (*yathbutu*) even without there being any claim (*ghayr di^cwah*) from the father.⁸ They further hold that an irregular (*fāsid*) marriage has no validity in Islamic law unless it is consummated;⁹ and a child is conceived as a result.¹⁰ In this case, (which will be

⁷ Al-Kāsānī, *Badā'ī^c al-Ṣanā'ī^c*, pp. 331-332, Ibn Qayyim, *Zād al-Ma^cād*, p. 116-119, al-Nawawī, *Minhāj al-Ṭālibin wa 'Umdat al-Muftīn*, printed together with Abū Zakariyyā al-Anṣārī, *Matn al-Minhāj*, p.106, al-Sharqāwī, *Hashiyah*, vol. II, p. 219, al-Dhahabī, *al-Aḥwāl al-Shakhṣiyyah*, p. 332, Muhammad Valibhai Merchant, *A Book of Qur'anic Laws*, p. 125, see also N.J. Coulson, *A History of Islamic Law*, p. 110, Ṣubḥī Maḥmaṣṣānī, *Turāth al-Khulafā'*, p. 367.

⁸ *Futūwā Alumghiri*, vol. IV, *op.cit.*, p.153; Neil B.E. Baillie, *A Digest of Moohummudan Law*, p.392, cf; Norman Anderson, *Law reform in the Muslim World*, pp. 105-6, cf; S. Ameer Ali, *Student's Handbook of Mahommedan Law*, p. 73.

⁹ Muḥammad Zakariyyā al-Bardīsī, *al-Aḥwāl al-Shakhṣiyyah*, p. 33, Norman Anderson, *Law reform in the Muslim World*, pp. 105-6.

discussed later). the child cannot be disowned by the husband except by the legal process of *li'cān*.¹¹ The doctrine of *al-walad li-al-firāsh* may also be applied to the owner a slave-girl in respect of a child born to her as a result of him having had sexual intercourse with her.¹² Permission for this kind of sexual intercourse is stated at least three times in the Holy Qur'ān i.e. chapter IV: 24, chapter XXIII:5-6 and chapter LXX: 29-30, provided that she is Muslim, Christian or Jewish and that the owner or master has not married her to another man.¹³ In the case of the owner or *mawlā* of the concubine having had licit sexual intercourse with her and she having given birth to a child whom the owner or *mawlā* recognises as his offspring, the child's *nasab* would be established from him without any claim being necessary from anyone else so long as the sexual

¹⁰ *Ṣaḥīḥ al-Bukhārī*, vol. VIII, p. 191, Ibn Qayyim, *Zād al-Ma'ād*, vol. IV, pp. 116-119, see also Uri Rubin, *al-walad li al-firāsh*, p.5; cf. al-Kaḥlānī, *Subul al-Salām*, vol. III, p.229, cf. al-'Asqalānī, *Fath al-Bārī*, vol. XXII, p. 37, al-Dārimī, *Sunan al-Dārimī*, vol. II, p. 389, al-Bayhaqī, *al-Sunan al-Kubrā*, vol. VII, p. 402; al-Suyūṭī, *Tanwīr al-Hawālik*, vol. II, pp. 213-214, M.Shalabi, *Aḥkām al-Uṣrah*, p. 684, cf. 'Umar 'Abd Allāh, *Aḥkām al-Sharī'ah*, p. 457, Reuben Levy, *The Social Structure of Islam*, p. 136. The meaning of the second portion of the hadith "the fornicator has to be stoned" is regarded as weak (*ḍa'īf*) because al-Nawawī argued that stoning specifically refers to the fornicator who is *muḥṣan*. [*qāla al-Nawawī wahuwa ḍa'īfun li-anna al-rajma mukhtaṣṣun bi al-muḥṣan*] and not every *zānī* is to be stoned. [See *Sunan al-Nasā'ī* with commentary from al-Suyūṭī, *Zahr al-Rabā' alā al-Mujtabā*, vol. VI, p. 148.]

¹¹ *Futāwā Alumghiri*, vol. IV, *op.cit.*, p.153; Neil B.E. Baillie, *A Digest of Moohummudan Law*, p.392.

¹² Robert Roberts, *The Social Laws of the Qur'ān*, p. 10, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol.II, p.41, Thomas Patrick Hughes, *Dictionary of Islam*, p. 600, cf. N.J. Coulson, *A History of Islamic Law*, p. 110, cf. Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, p. 264, cf. G.H. Bousquet and Joseph Schacht (ed.), *Selected Works of C. Snouck Hurgronje*, p. 67, Robert Roberts, *The Social Laws of the Qur'ān*, p. 16..

¹³ Thomas Patrick Hughes, *Dictionary of Islam*, p. 600, cf. N.J. Coulson, *A History of Islamic Law*, p. 110, cf. Robert Roberts, *The Social Laws of the Qur'ān*, p. 10, cf. Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, p. 264. According to the Mālikīs, no other individual would be allowed to have sexual intercourse with the slave girl other than the *ṣayyid*. This is because the *ḥadīth* of the Prophet says: 'It is not lawful to anyone who believes in Allāh and the day of judgement to have sexual intercourse with a woman who belongs to another person' [*la yaḥill li 'mri'in yu'min bi Allāh wa al-yawm al-ākhir an yusqiya mā'ahu zar'ā ghayrahu*]. This means the man would not be allowed to have sexual intercourse with a (slave) woman who belonged to another man. [see al-Sijistānī, *Sunan Abī Dā'ūd*, vol. II, p. 248, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, p. 97.]

intercourse which took place was permissible (*ḥalāl*).¹⁴ This is because the status of the slave girl (*amah*) in this context is regarded as belonging to his *firāsh*.¹⁵ Thus the doctrine *al-walad li-al-firāsh* applies to the child.¹⁶

As far as the Ḥanafīs are concerned, they hold that when a slave girl gives birth to a child as a result of sexual intercourse with her master, the child's *nasab* is only established from him if her master acknowledges paternity.¹⁷ On the other hand, the Shāfi'īs maintained that the child's *nasab* is established from him, even without his acknowledgement.¹⁸ In this the Ḥanafīs seem to be emphasising the power of the master over the slave-girl while the Shāfi'īs are attempting to establish freedom for the child. However, whether or not the owner claims he is the father, he must already have admitted to intercourse with the slave-girl for the Shāfi'ī argument to have any relevance.

Disputes about *nasab* sometimes occurred in connection with inheritance.

¹⁴N.J. Coulson, *A History of Islamic Law*, p. 110, cf. Neil B.E. Baillie, *A Digest of Moohummadan Law*, p.393.

¹⁵Ibn Qayyim, *Flām al-Muwaqqā'īn*, vol. IV, p. 442, al-Nawawī, *Minhāj al-Ṭālibīn wa 'Umdat al-Muftīn*, printed together with Abū Zakariyyā al-Anṣārī, *Matn al-Minhāj*, p. 106.

¹⁶See Ibn Qayyim, *Flām al-Muwaqqā'īn*, vol. IV, p. 442, cf. Ibn Qayyim, *Zād al-Ma'ād*, vol IV, p. 113, cf. al-Nawawī, *Minhāj al-Ṭālibīn wa 'Umdat al-Muftīn*, printed together with Abū Zakariyyā al-Anṣārī, *Matn al-Minhāj*, p. 106.

¹⁷Al-Marghīnānī, *al-Hidāyah*, vol. II, p. 68, Muḥammad Zakariyyā al-Bardīsī, *al-Aḥwāl al-Shakhṣiyyah*, p. 34.

¹⁸Abū Zakariyya al-Anṣārī, *Matn al-Minhāj* printed in the margin of al-Nawawī, *Minhāj al-Ṭālibīn*, p. 57, al-Nawawī, *Minhāj al-Ṭālibīn* printed with Abū Zakariyya al-Anṣārī, *Matn al-Minhāj*, p. 60, cf. al-Marghīnānī, *al-Hidāyah*, vol. II, p. 68.

However, Traditions from the Prophet Muḥammad firmly establish the doctrine al-walad li al-firāsh even when serious doubts are raised. In this context, there were several reports pertaining to the establishment of nasab. One of the reports, transmitted by Mujāhid (d.104 AH), stated that the wife of the Prophet Muḥammad, Zaynab al-Asadiyyah, daughter of Jahsh, appealed to the Prophet for advice as regards a person born to a slave-girl of her father. The slave-girl was suspected of having conceived her son from another man. The Prophet Muḥammad examined the physiognomy of the son, and realized that he was probably not the offspring of Zaynab's father who was already dead, but stated: "He is entitled to inheritance, but as for you Zaynab, veil yourself in his presence (i.e., he is not your brother by blood)." Thus, the right of the slave-girl's son to inherit from the "legal" father is upheld on the basis of the doctrine al-walad li-al-firāsh, although he was probably not his offspring.¹⁹ A second report was also transmitted by Mujāhid that the Prophet Muḥammad gave Sawdah the same advice as in the story about Zaynab.²⁰ This makes it clear that nasab is

¹⁹See the details of the subject, Uri Rabin, 'al-walad li'l-firāsh', pp.5-9. All versions of the ḥadith of the Prophet's reply to Sawdah confirmed that the legal affiliation between the slave-girl's son and her dead master was established.[Uri Rabin, 'al-Walad li'l-Firāsh', p. 9 citing Sunan al-Nasa'i, vol. VI, pp. 180-181.]

²⁰ʿĀi'shah reports: "Sa'd b. Abī Waqqāṣ and ʿAbd b. Zumʿah disputed with each other over a young boy. Sa'd said, Messenger of Allah, he is the son of my brother, ʿUtba b. Abī Waqqāṣ made it explicit that he was his son. Look at his resemblance. ʿAbd b. Zumʿah said, Messenger of Allah, he is my brother, as he was born on the bed of my father from his slave-girl. Allah's Messenger (peace be upon him) looked at him and found a clear resemblance with ʿUtba, but he said, "He is your brother ʿAbd b. Zumʿah for the child is to be attributed to the one on whose bed it is born and stoning for a fornicator. Sawdah bint Zumʿah, you should veil from him. So he did not see Sawdah at all".[see Ṣaḥīḥ Muslim, al-Jāmiʿ al-Ṣaḥīḥ, translated by ʿAbdul Hamid Siddiqi, vol II, 1976, p. 744, al-Burhānī, Kanz al-ʿUmmāl, vol. XV, p. 205, al-Sijistānī, Sunan Abu Dāʿūd, vol. II, p. 282, see also, Ibn Qayyim, Flām al-Muwaqqāʿīn, vol. IV, p. 442, al-Bayhaqī, al-Sunan al-Kubrā, vol. VI, p.412, al-Turkumānī, al-Jawhar al-Naqī printed together with al-Bayhaqī, al-Sunan al-Kubrā, vol. VII, pp. 412-413, al-Dārimī, Sunan al-Dārimī, vol. II, pp. 152-153, Ibn Rushd, Bidāyat al-Mujtahid, vol. II, p. 267.]

established by the doctrine of al-walad li al-firāsh.

In a third case, it is reported that:

'A man came to the Prophet complaining that his wife had delivered a black child [meaning to deny that such a child was his]. The Prophet asked him whether he had camels or not. He replied in the affirmative. Then the Prophet asked him what was their colour. He said that the colour of his camels was brown. Then the Prophet asked him whether there was a grey one among them (*awraq*). He replied in the affirmative. The Prophet asked how that was possible. The man said that perhaps it was because of heredity. The Prophet said that maybe his latest son has that colour because of heredity'.²¹

The ḥadīth implies that just because there was no resemblance in the colour of one of the camels so the same situation may occur in human beings. As there was no resemblance between the father and the child, the ḥadīth has clearly shown that the black son delivered by that woman has been regarded as legitimate even though some of the child's heirs rejected that because there was no resemblance. It is reported the blackness of the son was due to the man's heredity (*‘irq nazʿ*) which was also mixed. This ḥadīth proves that even though there is no resemblance among the heirs, it does not necessarily reflect the father-son relationship and the child should be regarded as legitimate.²² In other

²¹ Al-Sijistānī, *Sunan Abū Dāʿūd*, vol. II, p. 279, *Ṣaḥīḥ al-Bukhārī*, (Arabic-English), vol. VII, pp. 171-172, *Sunan al-Nasāʾī*, vol. VI, p. 146, al-Tirmidhī, *Sunan al-Tirmidhī*, vol. IV, p. 48, cf. Ibn Qudāmah, *al-Mughnī*, vol. V, pp. 694-697.

²² Ibn Qudāmah, *al-Mughnī*, vol. V, p. 697, *Ṣaḥīḥ al-Bukhārī*, (Arabic-English), vol. VII, pp. 171-172.

words, the doctrine of al-walad li al-firāsh prevails. The major way in which the doctrine al-walad li-al-firāsh could be invalidated and the nasab of the child repudiated is by legal process of li'cān which will be discussed later.

Nonetheless, Islamic law applies certain limitations to the doctrine of al-walad li al-firāsh as follows: (i) the husband must be capable of making the wife pregnant. Thus the husband must have reached the age of puberty (*bāligh*);²³ (ii) according to the Mālikīs, the Shāfi'īs and Aḥmad b. Ḥanbal, after the marriage contract has taken place, the husband and wife must have the possibility of living together (*talāqī*) so that the pregnancy could occur.²⁴ However, the Ḥanafīs are of the view that, although the husband and wife do not come together in private, the doctrine al-walad li al-firāsh still applied because the marriage contract itself would suffice to prove the woman belongs to her husband. Therefore, they regard the child as legitimate.²⁵ In this the Ḥanafīs seem anxious to establish the legitimacy of the child regardless of the fact that it is almost certainly illegitimate. For them, the doctrine of al-walad li al-firāsh takes precedence over the actual physical situation.

In determining the application of the doctrine to a child born after divorce

²³M. Shalabī, *Aḥkām al-Uṣrah*, p. 684; cf. Ibn 'Abdīn, *Hāshiyat Radd al-Muḥtār*, vol. II, p. 647; Ibn al-Humām, *Sharḥ Fath al-Qadīr*, vol. III, p. 301, cf. M. al-Dhahabī, *al-Aḥwāl al-Shakhṣiyyah*, p. 333.

²⁴M. Shalabī, *Aḥkām al-Uṣrah*, p. 685, Muḥammad Fīhr Shāqafah, *Sharḥ al-Aḥkām*, p. 210.

²⁵M. Shalabī, *Aḥkām al-Uṣrah*, p. 685.

or widowhood, the period of gestation is taken into consideration. According to the Ḥanafīs, the child born during the woman's waiting period (*ʿiddah*) of irrevocable or revocable divorce (*ṭalāq bāʿin* or *ṭalāq rajʿī*) is established, provided the husband does not deny the pregnancy and the gestation period of such a child is not more than two years for the Ḥanafīs or four years for the Shāfiʿīs and Aḥmad Ibn Ḥanbal respectively and five years for the Mālikīs.²⁶ In this the jurists seem to be deliberately ignoring the normal period of gestation in order to provide legitimacy for the child and are thus extending the doctrine of *al-walad li-al-firāsh* as far as they can. The Mālikīs are the most generous. The *Majallah*, in accordance with the Ḥanafīs, states the following provision:

'The shortest period of pregnancy is six months, the ordinary period is nine months, and the longest period is two years in law'.²⁷

According to all four schools of law, even the child of a pregnant woman, whose husband is dead who claimed her waiting period (*ʿiddah*) had not finished and who gave birth within less than two years of the death of her husband, is attributed to that man because when the conception occurred, the doctrine of *al-walad li-al-firāsh* still obtained.

²⁶ Ibn ʿAbdīn, *Hāshiyat Radd al-Muḥtār*, vol. III, p. 541, Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 268, Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, pp. 411-412, cf; M. Jawād Maghniyah, *al-Aḥwāl al-Shakhṣiyyah*, p. 78.

²⁷ The *Majallah*, article 332.

The rule is also applied if such a woman has not claimed pregnancy but had claimed that her 'iddah had finished. The child born within less than six months of the termination of her 'iddah, is established as being her husband's because it was not impossible that conception occurred before the death of her husband. Similarly, a child born to a woman who has been repudiated through revocable or irrevocable divorce or the death of husband should be regarded as his.²⁸ The discussion of a child born after or during the 'iddah of the woman is examined more fully in the following discussions.

I. Al-Bayyinah as a Means of Establishing Al-Walad li-al-Firāsh

In cases where there may have been some doubt about the nasab of a child, the jurists required proof (*bayyinah*) before the child's nasab could be established. These cases seem to involve a husband's reluctance to accept that a child had been born to his wife and he wanted proof that she had really given birth. He is not doubting the woman's fidelity but is suspicious that someone else's child is being foisted on him. However, while this problem might occur in cases where the husband had been unaware of his wife's pregnancy, they would, perhaps, be more common where the wife is attempting to establish a claim for a foundling on the basis of istilhāq, which will be discussed later. Such cases seem to have particularly involved the removal of doubt through bayyinah

²⁸ Al-Dhahabī, al-Aḥwāl al-Shakṣiyyah, pp. 337-338.

when a woman claimed that a child was hers and therefore in terms of the doctrine of al-walad li-al-firāsh, the child should have his/her nasab from her husband. In such cases according to Muslim scholars, there was a need for witnesses to the birth who could supply proof (bayyinah) through oral testimony and thus establish the birth to her thereby establishing the child's nasab on the basis of al-walad li-al-firāsh.²⁹ The majority of the Muslim jurists insisted that if two persons testified that such a child belonged to the woman, if her husband doubted the birth or identity of the child, the child would have his nasab established from him. The husband could also claim that a child was born to his wife or his slave-woman on the basis of bayyinah, thereby establishing the child's nasab as being from him.³⁰

The Qur'ānic verse al-Baqarah:282 says:

"... and get two witnesses of your own men if there are not two men then a man and two women such as you choose for witnesses ..."

This Qur'anic verse has been put forward by the majority of jurists as a general principle regarding the doctrine of bayyinah, i.e. two men or one man and two women. This implies that a man is equal to two women in terms of

²⁹R. Brunschvig see v. 'bayyina' in *El²*, vol. I, p. 1150, cf; Ibn Qayyim, *al-Turuq al-Hukmiyyah*, p. 15.

³⁰Al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VII, p. 695.

testimony.³¹ However, when a dispute arises over the child's birth to a woman if the delivery was witnessed by a free Muslim female like a midwife (*qābilah*), most Muslim jurists, including Abū Yūsuf and Muḥammad al-Shaybānī, the Mālikīs, including Mālik himself, Ibn al-Qāsim and Ibn Wahb and most of the Ḥanbalīs hold that the child's *nasab* should be regarded as being established as being from the husband.³² On the other hand, according to the Shāfi'ī, al-

³¹ See for example, al-Shāfi'ī, *al-Umm*, vol. VI, p. 50, al-Shīrāzī, *al-Muḥadḍahab*, vol. II, p. 337, al-Maqdisī, *al-Uddah Sharḥ al-Umdah*, p. 644, Aḥmad al-Dardīr, *Aqrab al-Masālik*, p. 176, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, p. 304, Nawab A.F.M. Abdur Rahaman, *Institutes of Mussalman Law*, p. 200, Aḥmad al-Ṣāwī, *Bulghat al-Salik*, vol. II, p. 360, al-Sarakhsī, *al-Mabsūt*, vol. VI, p. 49, al-Zuhaylī, *al-Fiqh al-Islāmī*, p. 695, cf. al-Dhahabī, *al-Aḥwāl al-Shakhṣiyyah*, p. 344, cf. M. Shalabī, *Aḥkām al-Uṣrah*, pp. 705-706, Muḥammad Zakariyyā al-Bardīsī, *al-Aḥwāl al-Shakhṣiyyah*, p. 34. According to the Shāfi'īs, this is applied if *bayyinah* involves property viz sale, contract, rent, killing by mistake etc. [al-Dimashqī, *Kifāyāt al-Akhyār*, p. 569.] However, if *bayyinah* involves other than property (*māl*) like, *nasab*, marriage, divorce, manumission, legacy, killing with intention relating to *ḥudūd* other than *zinā*, the witnesses should comprise of two just men. [al-Dimashqī, *Kifāyāt al-Akhyār*, p. 569, cf. al-Malibārī, *Fath al-Mu'īn*, p. 146.] Apart from this, according to the Shāfi'īs, if the *bayyinah* involves the right of Allāh (*ḥuqūq Allāh*), it is sufficient for one male witness only, like seeing the crescent of the fasting month (*hilāl ramaḍān*). [al-Dimashqī, *Kifāyāt al-Akhyār*, p. 572.] As far the witnessess are concerned, there are three major factors discussed by the majority of Muslim jurists; (i) qualities (*ṣifah*) of the witnesses. These comprise five matters, i.e. the justice (*ʿadālah*), the age of majority (*bulūgh*), Muslim, free (*ḥurr*) and capable of negating accusation (*nafy al-tuhmah*). However, as far as the justice (*ʿadālah*) is concerned, the majority disagree with each other on the meaning of *ʿadālah*. As al-Qurʾān says: (al-ṭalāq (65):2) '... and call to witness two just men among you...' The majority hold, *ʿādil* denotes a person who avoids forbidden and reprehensible acts but always does obligatory and commendable one. Abu Ḥanīfah holds, as long as the witness is a Muslim, he could be considered as *ʿādil*. [Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 348, cf. al-Sarakhsī, *al-Mabsūt*, vol. VI, *op.cit.*, p. 49.] (ii) number (*ʿadad*) and; (iii) sex of the witnesses. According to the majority, as far as *zinā* is concerned, four men witnesses who are just (*ʿādil*) are required. Other than *zinā*, it is sufficient for two just male witnesses. In the case of oral testimony involving property, one just man and two women are essential. [Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 348.]

³² Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 348, cf. al-Zaylaʿī, *Tabayin al-Ḥaqāʾiq*, vol. III, p. 43, al-Sarakhsī, *al-Mabsūt*, vol. VI, *op.cit.*, p. 49, cf. Aḥmad al-Dardīr, *Aqrab al-Masālik*, p. 176, al-Nafrāwī, *al-Fawākih al-Dawānī*, p. 304, cf. al-Maqdisī, *al-Uddah Sharḥ al-Umdah*, p. 644, Ibn Rajab, *al-Qawāʾid*, p. 322, cf. Muḥy al-Dīn ʿAbd al-Ḥamid, *al-Aḥwāl al-Shakhṣiyyah*, p. 487, cf. Zakī al-Dīn Shaʿbān, *al-Aḥkām al-Sharʿiyyah*, p. 562, cf. Subḥī Maḥmaṣṣānī, *al-Mujtahidūn fi al-Qaḍāʾ*, p. 51, Aḥmad Ibrāhīm Bek, *al-Aḥkām al-Sharʿiyyah*, p. 124, al-Ḥāj Ḥamdī al-Aʿzamī, *al-Muḥāḍarāt fi al-Aḥwāl al-Shakhṣiyyah*, p. 83, al-Ḥaṣkafī, *Sharḥ al-Durr al-Mukhtār*, vol. I, p. 490, Zakī al-Dīn Shaʿbān, *al-Aḥkām al-Sharʿiyyah*, pp. 561-565, cf. Aḥmad al-Kabīsī, *al-Aḥwāl al-Shakhṣiyyah*, pp. 315-319, cf. M. Shalabī, *Aḥkām al-Uṣrah*, pp. 680-681, al-Ḥāj Ḥamdī al-Aʿzamī, *al-Muḥāḍarāt fi al-Aḥwāl al-Shakhṣiyyah*, p. 83, al-Ḥaṣkafī, *Sharḥ al-Durr al-Mukhtār*, vol. I, p. 490. The Mālikīs are reported to have held two views regarding the requirement of testimony (*bayyinah*), (i) it must comprise two men. This was the view of Ashhab and Ibn Majshūn. Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 348, al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VII, p. 695. (ii) it must comprise one man and two women. This was the view of Mālik, Ibn al-Qāsim and Ibn Wahb. [Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 348.]

Dimashqī, nasab was one of the matters which demanded two male witnesses.³³ Later the Shāfi'īs accepted four women in place of the two men,³⁴ presumably because it was unlikely that in most cases of child birth there would be a male witness at that time. However, the excessive nature of four women being present at the birth led to the Shāfi'īs modifying their position to two women.³⁵ They refused to accept the testimony of one woman only.³⁶ There are two ḥadīths referring to this matter. It has been reported by Ḥudhayfah that the Prophet Muḥammad permitted the midwife (*al-qābilah*) to be the witness of delivery.³⁷ In the second ḥadīth, the Prophet Muḥammad said that women's witness is permissible when men's witness is not possible.³⁸ Thus, while the majority of schools of law accepts the first ḥadīth, however late it may be, the Shāfi'īs choose to reject that and follow the second ḥadīth but they specified that one woman was insufficient. The Majallah sums up this doctrine as follows:

'If a married woman claims, during the marriage to have had a child whose birth or identity the husband denies, the evidence of one upright Mohammedan woman, free and known for her probity, is enough to establish the birth or identity'.³⁹

³³ Al-Dimashqī, Kifāyāt al-Akhyār, p. 569.

³⁴ Al-Sarakhsī, al-Mabsūṭ, vol. VI, p. 49, al-Dimashqī, Kifāyāt al-Akhyār, p. 569..

³⁵ Ibn Rushd, Bidāyat al-Mujtahid, vol. II, p. 348 cf; al-Sarakhsī, al-Mabsūṭ, vol. VI, p. 49.

³⁶ Al-Sarakhsī, al-Mabsūṭ, vol. VI, p. 49.

³⁷ Al-Sarakhsī, al-Mabsūṭ, vol. VI, *op.cit.*, p. 49, al-Zayla'ī, Tabayīn al-Ḥaqqā'iq, vol. III, p. 43.

³⁸ Al-Sarakhsī, al-Mabsūṭ, vol. VI, *op.cit.*, p. 49.

³⁹ The Majallah, article 348.

An area for the establishment of the nasab of the child where bayyinah for the birth of the child is particularly important is that of women where the delivery of the child takes place for them when those women are separated from the husbands but are in the ‘iddah or waiting period to finalise that separation. These women fall into three classes: (i) women in their ‘iddah for a irrevocable (bā’in) divorce; (ii) women in their ‘iddah for revocable (raj‘ī) divorce; (iii) widows in their ‘iddah after the death of their husband.⁴⁰

(i) When the wife is in the status of bā’in divorce, the status of a child born to her would be judged according to whether the husband acknowledges the wife's conception or not. If he does and the conception is obvious, according to Abū Ḥanīfah, the woman's delivery is established by her acknowledgement. However, Abū Yūsuf and Muḥammad al-Shaybānī hold that the fact that the child was born to that woman is only established if the woman could provide proof, i.e. one just woman or a midwife. The Mālikites hold that the requirement of two witnesses is essential in this context. In the case of the husband being unaware of the wife's conception or the wife's pregnancy not being obvious, according to Abū Ḥanīfah, the fact that the child was actually born to that

⁴⁰The period of the ‘iddah for both revocable (raj‘ī) and irrevocable (bā’in) divorces is three menstrual periods (qur). For the widow it is four months and ten days. The raj‘ī divorce refers to the first two declarations of divorce which the husband is allowed to withdraw before the end of the ‘iddah. If he does not, he is allowed to marry her again but the marriage requires all the formal requirement of the first marriage including the dower (mahr). The bā’in divorce refers to the third declarations which immediately terminates the marriage although the woman must still observe the ‘iddah. The husband cannot remarry the woman until she has been married to someone else. In which case that marriage would again require all the formal requirement of a marriage.

woman is only established by full proof (*shahādah kāmilah*), i.e. two just men or one just man and two just women. This is because witnesses in this context are required to establish the child's nasab from the husband (*mutalliq*) as a result of the child actually being born to that woman. Thus, the establishment of nasab requires full proof. However, Abū Yūsuf and Muḥammad al-Shaybānī hold the woman's delivery should be regarded as established through the testimony of one just woman like a midwife because the meaning of the proof in this context is to affirm the woman's delivery, doubted by the husband, not the child's nasab because establishing nasab in this context does not require witnesses. This is because as long as the wife is in her waiting period (*ʿiddah*), the child's nasab is established from the father automatically without further requirements of the witnesses. Thus, one woman witness like a midwife in this context suffices to establish the child's birth to that woman.⁴¹

(ii) The position of the woman who delivers a child in the *ʿiddah* of a revocable (*rajʿī*) divorce is subject to some dispute. Some scholars classify her position and therefore the nasab of her child in exactly the same way as an undivorced wife of the husband and make the same rules apply to her as to the wife. On the other hand, another group of scholars argue that with the delivery

⁴¹ See al-Ḥaṣḥafī, *Sharḥ al-Durr al-Mukhtār*, vol. I, p. 490, al-Sarakhsī, *al-Mabsūt*, vol. VI, p. 50, al-Zaylāʿī, *Tabyīn al-Ḥaqāʾiq*, vol. III, p. 43, Zakī al-Dīn Shāʿbān, *al-Aḥkām al-Sharʿiyyah*, pp. 561-565, cf. Aḥmad al-Kabīsī, *al-Aḥwāl al-Shakṣiyyah*, pp. 315-319, cf. M. Shalabī, *Aḥkām al-Uṣrah*, pp. 680-681, al-Ḥāj Ḥamdī al-Aʿẓamī, *al-Muḥāḍarāt fī al-Aḥwāl al-Shakṣiyyah*, p. 83.

of the child, her ‘iddah comes to an end and so does the marriage and therefore the same rules of bayyinah apply to her as to the wife of a bā’in divorce as far as the nasab of the child is concerned.⁴²

(iii) When the woman is observing the waiting period because of the death of her husband and the pregnancy was not obvious and the heirs of the woman deny the delivery, the status of that woman should be regarded as similar to a woman who is observing bā’in divorce. The same rules of bayyinah apply to the nasab of her child. However, if the woman's pregnancy is obvious and the heirs of the woman admit the pregnancy, according to Abū Ḥanīfah, the woman's delivery should be regarded as established. Abū Yūsuf and Muḥammad al-Shaybānī, on the other hand, are reported to have maintained that a just woman like a midwife is required. The Mālikīs hold that there must be two women witnesses. In the case of the pregnancy which is not obvious and the heirs of the woman are not aware of the woman's conception, Abū Ḥanīfah holds that a full proof, i.e. two men or one man and two women are required. Abū Yūsuf and Muḥammad al-Shaybānī still maintain that the delivery of the child should be regarded as established if the woman could provide a woman witness like a

⁴²See Zakī al-Dīn Shāḥbān, *al-Aḥkām al-Shar‘iyyah*, pp. 561-565, cf. Aḥmad al-Kabīsī, *al-Aḥwāl al-Shakhṣiyyah*, pp. 315-319, cf. M. Shalabī, *Aḥkām al-Uṣra’*, pp. 680-681, al-Ḥāj Ḥamdī al-A‘ẓamī, *al-Muḥāḍarāt fī al-Aḥwāl al-Shakhṣiyyah*, p. 83, cf. al-Dhahabī, *al-Aḥwāl al-Shakhṣiyyah*, p. 337.

midwife. But, the Mālikīs still insist on two women.⁴³ The *Majallah* states:

*'The child born of a woman of age who has been revocably repudiated, and has not declared that her 'iddah is complete, belongs to the husband, whether its birth took place before or after the period of two years from the dissolution of the marriage. If there was an irrevocable repudiation, perfect or imperfect, and the woman does not declare that her 'iddah is complete, the child to whom she may give birth within two years of the dissolution of marriage belongs to the husband...'*⁴⁴

Another important area for the establishment of the *nasab* of the child where *bayyinah* is needed, is that affecting women whose 'iddah either for divorce or widowhood, has been acknowledged by them to have expired and they, then, give birth to a child within a period of less than six months after the alleged expiry of their 'iddah, i.e. within a time scale when they could have conceived the child through intercourse with their former husband. If this claim is true, it is clear that the woman was wrong about the expiry of her 'iddah, either through ignorance or some unusual physical condition. In this case, the jurists demand that the birth of the child to that woman be proved through evidence (*bayyinah*).⁴⁵ In other words, they are trying to protect the former husband from being deceived into accepting someone else's discarded child. In

⁴³See Zakī al-Dīn Shā'ibān, *al-Aḥkām al-Shar'iyyah*, pp. 561-565, cf; Aḥmad al-Kabīsī, *al-Aḥwāl al-Shakhṣiyyah*, pp. 315-319, cf; M. Shalabī, *Aḥkām al-Uṣrah*, pp. 680-681, al-Ḥāj Ḥamdī al-Aẓamī, *al-Muḥāḍarāt fī al-Aḥwāl al-Shakhṣiyyah*, p. 83, cf; al-Dhahabī, *al-Aḥwāl al-Shakhṣiyyah*, p. 338.

⁴⁴The *Majallah*, article 344.

⁴⁵Al-Sarakhsī, *al-Mabsūṭ*, vol. VI, *op.cit.*, p.50, cf; Muḥy al-Dīn 'Abd al-Ḥamīd, *al-Aḥwāl al-Shakhṣiyyah*, p. 488.

the case of a woman whose ‘iddah has expired and a child was born more than six months after the divorce, the child's nasab could not be regarded as established from the husband because, according to the Ḥanafīs, if the acknowledgement was made by the woman that her waiting period had already expired, her acknowledgement should be accepted and a birth which takes place after the expiry of the waiting period will only be acceptable if it takes place within the normal period of pregnancy. Therefore, as far as the child's nasab is concerned in this context, it would not be established from the husband and the child would be illegitimate. Thus, if the birth of a child takes place after the woman's ‘iddah has expired and the time of the birth is consistent with a period of pregnancy which would confirm that the woman had conceived the child after her ‘iddah had expired, the nasab of the child is not established from her former husband.⁴⁶

II. Problematic Intercourse (wat' shubhah)

The problem of nasab arises in the area of wat' shubhah (problematic intercourse), that is where the carnal relations between the couple were actually unlawful but the couple were not aware of this.⁴⁷ The Ḥanafī jurists have

⁴⁶ Al-Sarakhsī, *al-Mabsūṭ*, vol. VI, *op.cit.*, p.50, cf; Muḥy al-Dīn ‘Abd al-Ḥamīd, *al-Aḥwāl al-Shakhṣiyyah*, p. 488.

⁴⁷ Al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VII, p. 688, cf; Aḥmad al-Kabīsī, *al-Aḥwāl al-Shakhṣiyyah*, p. 311, Muḥammad Zakariyyā al-Bardīsī, *al-Aḥwāl al-Shakhṣiyyah*, p. 34, cf; Zakī al-Dīn Sha‘bān, *al-Aḥkām al-Shar‘iyyah*, p. 581, cf; Neil B.E. Baillie, *A Digest of Moohummadan Law*, pp. 400-3, cf; al-Dhahabī, *al-Aḥwāl al-Shakhṣiyyah*, p. 336, cf; Ibn ‘Abdīn, *Hāshiyat Radd al-Muḥtār*, p. 549, cf; al-Ḥāj Ḥamdī al-A‘ẓamī, *al-*

categorised problematic intercourse into three types, i.e. problematic in terms of action (*shubhah fi al-fiʿl*), problematic in terms of place (*shubhah fi al-mahall*) and problematic in terms of contract (*shubhah fi al-ʿaqd*).⁴⁸ Jurists from other schools use different terms but in general they arrive at a similar conclusion.⁴⁹ The Ḥanafī categorisation seems the most appropriate and will be used here. The Ḥanafīs hold that problematic intercourse in terms of action (*shubhah fi al-fiʿl*) has three types:

(i) After a man has divorced his wife three times and her *ʿiddah* for the third divorce has not yet expired, the man is not allowed to have sexual intercourse with her. So if he does have sexual intercourse with her in ignorance while his former wife is observing her waiting period, the intercourse should be

Muḥāḍarāt fi al-Aḥwāl al-Shakhṣiyyah, p. 81, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, pp. 156-160, Ibn Qudāmah, *al-Mughnī*, vol. VII, pp. 430-432.

⁴⁸Faiz. Badruddin Tyabji, *Muhammadian Law*, p. 144, Neil B.E.Baillie, *A Digest of Moohummudan Law*, vol. I, p. 213, cf; Ahmed Shukri, *Muhammedan law of Marriage and Divorce*, pp.30-32, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, pp. 156-157, Syed Khalid Rashid, *Muslim Law*, p. 63, cf; Nawab A.F.M Abdur Rahman, *Institutes of Mussalman Law*, op.cit., p. 82, Thomas Patrick Hughes, *Dictionary of Islam*, op. cit., p. 317, cf; Syed Khalid Rashid, *Muslim Law*, op.cit., p. 63, cf; A.A.A. Fyzee, *Outlines of Muhammadan Law*, p. 94, cf; Ahmed Shukri, *Muhammedan Law of Marriage and Divorce*, pp.30-32, David Pearl, *A Textbook on Muslim Personal Law*, pp. 46-56, Muḥammad Zakariyyā al-Bardīsī, *al-Aḥwāl al-Shakhṣiyyah*, pp. 35-36, cf; Aḥmad al-Kabīsī, *al-Aḥwāl al-Shakhṣiyyah*, p. 311, cf; ʿUmar ʿAbd Allāh, *al-Aḥkām al-Sharʿiyyah*, p. 466, cf; Zakī al-Dīn Shaʿbān, *al-Aḥkām al-Sharʿiyyah*, p. 581.

⁴⁹Al-Sharqāwī, *Hāshiyah*, vol. II, p. 219, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, p. 41, Ṣāliḥ ʿAbd al-Samīʿ al-Azhārī, *al-Thamar al-Dānī*, p. 408, al-Kaḥlānī, *Subul al-Salām*, vol. II, p. 192, Ibn Abū Zayd, *Bākūrat al-Saʿd* translated by Alexander David Russell and al-Maʾmūn al-Suhrawardī, *First Steps in Muslim Jurisprudence*, p. 21, al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, vol. VII, p. 540, Ibn Qudāmah, *al-Mughnī*, vol. VII, pp. 431-432.

regarded as problematic on the basis of ignorance.⁵⁰ Any child born from this ignorant violation of the law would derive his/her *nasab* from the man, who would also support him/her.

(ii) The father of the owner of the slave-woman is not allowed to have sexual intercourse with her. If he does so knowingly, he is liable for the *ḥadd* punishment for adultery. The problematic nature of this intercourse may arise in this case because the father thought that the slave belonging to his son would also belong to him because of the ḥadīth which says, 'You and your property belong to your father'.⁵¹ In this case it would seem that the offspring of such a union would belong to the father and derive his/her *nasab* from him.

(iii) This arises if the woman is a pledged slave where the pledgee (*al-murtahan*) has had sexual intercourse with her. Even though the pledgor (*al-rāhin*) is on a similar footing as the pledgee, the child born should be regarded

⁵⁰ Al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VII, p. 688, cf; Aḥmad al-Kabīsī, *al-Aḥwāl al-Shakhṣiyyah*, p. 311, Muḥammad Zakariyyā al-Bardīsī, *al-Aḥwāl al-Shakhṣiyyah*, p. 34, cf; Zakī al-Dīn Shaʿbān, *al-Aḥkām al-Sharʿiyyah*, p. 581, cf; Neil B.E. Baillie, *A Digest of Moohummudan Law*, pp. 400-3, cf; al-Dhahabī, *al-Aḥwāl al-Shakhṣiyyah*, p. 336, cf; Ibn ʿAbdīn, *Ḥāshiyah Radd al-Muḥtār*, p. 549, cf; al-Ḥāj Ḥamdī al-Aʿẓamī, *al-Muḥāḍarāt fi al-Aḥwāl al-Shakhṣiyyah*, p. 81, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, pp. 156-160, Ibn Qudāmah, *al-Mughnī*, vol. VII, pp. 431-432, Aḥmad Ibrāhīm Bek, *al-Aḥkām al-Sharʿiyyah*, p. 122.

⁵¹ Al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VII, p. 688, cf; Aḥmad al-Kabīsī, *al-Aḥwāl al-Shakhṣiyyah*, p. 311, Muḥammad Zakariyyā al-Bardīsī, *al-Aḥwāl al-Shakhṣiyyah*, p. 34, cf; Zakī al-Dīn Shaʿbān, *al-Aḥkām al-Sharʿiyyah*, p. 581, cf; al-Dhahabī, *al-Aḥwāl al-Shakhṣiyyah*, p. 336, cf; Ibn ʿAbdīn, *Ḥāshiyat Radd al-Muḥtār*, p. 549, cf; al-Ḥāj Ḥamdī al-Aʿẓamī, *al-Muḥāḍarāt fi al-Aḥwāl al-Shakhṣiyyah*, p. 81, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, pp. 156-160, Neil B.E. Baillie, *A Digest of Moohummudan Law*, pp. 400-3, Ibn Qudāmah, *al-Mughnī*, vol. VII, pp. 431-432, cf; Aḥmad Ibrāhīm Bek, *al-Aḥkām al-Sharʿiyyah*, p. 122.

as established from the pledgee (*al-murtahan*) if the pledgee makes the acknowledgement of paternity.⁵²

An example of *shubhat fi al-fi'* given by the Shāfi'is is when a person has sexual intercourse with a woman thinking that woman was his wife or his slave-girl.⁵³ In this case the *nasab* of any offspring will belong to that person and the doctrine of *al-walad li-al-firāsh*, will not apply, provided that the act of intercourse performed as a result of ignorance of the status of the woman is acknowledged. This is called *shubhat al-nikāḥ* by the Mālikis.⁵⁴

As far as intercourse which is problematic in terms of place (*shubhah fi al-mahall*) is concerned, the Ḥanafis give the following examples:

(i) When the intercourse is with a woman whom the man has irrevocably divorced by ambiguous expressions (*kināyah*).⁵⁵ In effect he has not used the

⁵²See Neil B.E. Baillie, *A Digest of Moohummudan Law*, pp. 400-3, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, pp. 156-157, Aḥmad Ibrāhīm Bek, *al-Aḥkām al-Shar'iyyah*, p. 122.

⁵³Al-Khaṭīb, *al-Iqnā'*, p. 418, see also commentary by al-Shaykh 'Iwāḍ and al-Bājūrī printed in the margin of al-Khaṭīb, *al-Iqnā'*, p. 418, al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, vol. VII, p. 540.

⁵⁴Aḥmad al-Dardīr, *Aqrab al-Masālik*, vol. I, p. 378 printed together with Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. I, p. 378, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, p. 41, cf; Sāliḥ 'Abd al-Samī' al-Azhari, *al-Thamar al-Dānī*, p. 408.

⁵⁵See Neil B.E. Baillie, *A Digest of Moohummudan Law*, pp. 400-3, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, p.p. 156-157, Aḥmad Ibrāhīm Bek, *al-Aḥkām al-Shar'iyyah*, p. 122, Faiz Badruddin Tyabji, *Muhammadian Law*, p. 144, cf; Ahmed Shukri, *Muhammedan law of Marriage and Divorce*, pp.31-32, cf; Syed Khalid Rashid, *Muslim Law*, *op.cit.*, p. 64, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, pp. 156-157, cf; Nawab A.F.M Abdur Rahman, *Institutes of Mussalman Law*, *op.cit.*, p. 82, Thomas Patrick Hughes, *Dictionary of Islam*, *op. cit.*, p. 317, cf, Ahmed Shukri, *Muhammedan Law of Marriage and Divorce*, *op.cit.*,

proper formula for divorce and the nasab of a child arising from intercourse after that would be from his/her father.

(ii) When the father of the owner of a slave-girl has intercourse with her, thinking that this is his right. This is the same as shubhat fī al-fiʿl. However, the Ḥanafīs are distinguishing between two aspects of the problematic nature of the intercourse. The first arises out of the action, the second arises out of the place.

(iii) Where the action took place where a slave girl has been sold to the man but not delivered to him.⁵⁶ The same two aspects of shubhat fī al-fiʿl and shubhat fī al-mahall also arise here as they did in the previous example.

On the other hand, the jurist, al-Qādī Abū Yaʿlā, the follower of the Ḥanbalīs, says that if a person has sexual intercourse with an unmarried woman of a problematic nature (*shubhah*), the child could not be regarded as established from him because nasab is only established if there was ṣaḥīḥ or fāsid marriage or concubinage and in this case shubhat fī al-fiʿl, shubhat fī al-

p. 30, cf; Syed Khalid Rashid, *Muslim Law*, op.cit., p. 63, cf; A.A.A. Fyzee, *Outlines of Muhammadan Law*, p. 94, cf; David Pearl, *A Textbook on Muslim Personal Law*, pp. 46-56, Muḥammad Zakariyyā al-Bardīsī, *al-Aḥwāl al-Shakhṣiyyah*, pp. 35-36, cf; Aḥmad al-Kabīsī, *al-Aḥwāl al-Shakhṣiyyah*, p. 311, cf; ʿUmar ʿAbd Allāh, *al-Aḥkām al-Sharʿiyyah*, p. 466, cf; Zakī al-Dīn Shāʿbān, *al-Aḥkām al-Sharʿiyyah*, p. 581.

⁵⁶ Neil B.E. Baillie, *A Digest of Moohummudan Law*, pp. 400-3, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, p.p. 156-157, Aḥmad Ibrāhīm Bek, *al-Aḥkām al-Sharʿiyyah*, p. 122.

maḥall and *shubhat fi al-milk* would not apply.⁵⁷ Thus, if sexual intercourse occurs outside those occasions, i.e. *ṣaḥīḥ* or *fāsid* marriage, concubinage, the occurrence of the sexual intercourse should be regarded as *zinā* because its occurrence was not based on a contract (ʿaqd). However, al-Shāfiʿī and Abū Ḥanīfah and most of the Ḥanbalīs maintain that the child should be regarded as established from that man. They justify this by maintaining that the sexual intercourse which took place is assumed (*iʿtiqād*) to be legitimate like a *fāsid* marriage. This differs from *zinā* where the occurrence of the sexual intercourse is known to be unlawful.⁵⁸

Problematic cohabitation could also be defined as one in which both parties are in a *bona fide* ignorance of the bar to their union.⁵⁹ This matter arises, in particular when the parties go through with a contract of marriage which is either absolutely forbidden or where the requirements of the marriage contract have not been fulfilled. The Ḥanafīs try to distinguish in this form of marriage between *nikāḥ fāsid*, i.e. an irregular marriage, and *nikāḥ bāṭil*, i.e. a marriage which is totally contrary to the laws of Islām and is absolutely not

⁵⁷Ibn Qudāmah, *al-Mughnī*, vol. VII, pp. 431-432. *Shubhat al-milk* is used by other jurists for the example used by the Ḥanafites of a father in ignorance of the true facts who has intercourse with his son's slave-girl. This term is also used by the Mālikīs. [See Aḥmad al-Dardīr, *Aqrab al-Masālik*, vol. I, p. 378 printed together with Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. I, p. 378, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, p. 41, cf. Sāliḥ ʿAbd al-Samīʿ al-Azhārī, *al-Thamar al-Danī*, p. 408, Muḥammad Zakariyyā al-Bardīsī, *al-Aḥwāl al-Shakhsiyyah*, p. 36.

⁵⁸Ibn Qudāmah, *al-Mughnī*, vol. VII, pp. 431-432.

⁵⁹Seymour Vesey-Fitzgerald, *Muhammadan Law*, p. 48.

allowed to take place. However, there is some dispute among them about these terms and most other jurists used the terms interchangeably.⁶⁰ Therefore, as the concern of this thesis is the *nasab* of children arising out of such marriages, there will be no minute examination of the Ḥanafī distinction in the terms.⁶¹ The area in which marriage is absolutely forbidden is concerned with the forbidden degrees of relationship. These forbidden degrees of marriage have been set out in the Holy Qur'ān al-Nisā': 23.⁶² They include consanguinity (*nasab*),⁶³ affinity

⁶⁰N.U.A. Siddiqui, *Studies in Muslim Law*, vol. I, p. 68, Neil B.E. Baillie, *A Digest of Moohummudan Law*, pp. 150-1, cf; S. Ameer Ali, *Student's Handbook of Mahommedan Law*, p. 73, Sethi, *Muslim Marriage and Its Dissolution*, pp. 35-37, J.N.D. Anderson, 'Invalid and Void Marriages in Ḥanafī Law', in BSOAS 13, 1950, p. 357, Faiz. Badruddin Tyabji, *Muhammadian Law*, p. 144, cf; Ahmed Shukri, *Muhammedan law of Marriage and Divorce*, pp.30-32, cf; Syed Khalid Rashid, *Muslim Law*, op.cit., p. 64, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, p.p. 156-157, cf; Nawab A.F.M Abdur Rahman, *Institutes of Mussalman Law*, op.cit, p. 82, Thomas Patrick Hughes, *Dictionary of Islam*, op. cit., p. 317, cf; Syed Khalid Rashid, *Muslim Law*, op.cit., p. 63, cf; A.A.A. Fyzee, *Outlines of Muhammadan Law*, p. 94, cf; David Pearl, *A Textbook on Muslim Personal Law*, pp. 46-56, Muḥammad Zakariyyā al-Bardīsī, *al-Aḥwāl al-Shakhṣiyyah*, pp. 35-36, cf; Aḥmad al-Kabīsī, *al-Aḥwāl al-Shakhṣiyyah*, p. 311, cf; 'Umar 'Abd Allāh, *al-Aḥkām al-Shar'īyyah*, p. 466, cf; Zakī al-Dīn Sha'bān, *al-Aḥkām al-Shar'īyyah*, p. 581, Majid Khadduri, *al-Shāfi'ī's al-Risāla*, p. 169.

⁶¹K.N. Ahmed, *The Muslim Law of Divorce*, pp. 790-791, Faiz Badruddin Tyabji, *Muhammadian Law*, p. 144, Neil. B.E. Baillie, *A Digest of Moohummudan Law*, vol. I, p. 213, cf; Ahmed Shukri, *Muhammedan law of Marriage and Divorce*, pp.31-32, cf; Syed Khalid Rashid, *Muslim Law*, op.cit., pp.63-64, cf Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, p.p. 156-157, cf; Nawab A.F.M Abdur Rahman, *Institutes of Mussalman Law*, op.cit, p. 82, Thomas Patrick Hughes, *Dictionary of Islam*, op. cit., p. 317, cf; A.A.A. Fyzee, *Outlines of Muhammadan Law*, p. 94, cf; David Pearl, *A Textbook on Muslim Personal Law*, pp. 46-56, Muḥammad Zakariyyā al-Bardīsī, *al-Aḥwāl al-Shakhṣiyyah*, pp. 35-36, cf; Aḥmad al-Kabīsī, *al-Aḥwāl al-Shakhṣiyyah*, p. 311, cf; 'Umar 'Abd Allāh, *al-Aḥkām al-Shar'īyyah*, p. 466, cf; Zakī al-Dīn Sha'bān, *al-Aḥkām al-Shar'īyyah*, p. 581.

⁶²'Forbidden unto you are your mothers, and your daughters, and your sisters, and your brother's daughters, and your sister's daughters, and your foster-mothers, and your foster sisters, and your mothers-in-law, and your step-daughters who are under your protection (born) of your women unto whom ye have gone in - but if ye have not gone in unto them, then it is no sin for you (to marry their daughters) - and the wives of your sons who (spring) from your own loins. And (it is forbidden unto you) that ye should have two sisters together, except what hath already happened (of that nature) in the past. Lo! Allāh is ever forgiving, Merciful.'

⁶³I.e. marriage to a man's mother and all female ascendants; a man's daughter and all female descendants; a man's sister whether she is germane, consanguine or uterine; a man's paternal aunt and paternal aunt of any ascendant; a man's maternal aunt to that of any ascendant; a man's brother's daughter, regardless of degree of descent; a man's sister's daughter regardless of degree of descent.[M.Zayd al-Abyānī, *Sharḥ al-Aḥkām*, vol. I, p. 51, cf; Aḥmad al-Sāwī, *Bulghat al-Sālik*, vol. I, p. 515.] The general injunction from the text is that a man is prohibited from marrying his foster-relatives when the child has been suckled once or

(muṣaharah),⁶⁴ and fosterage (raḍā'ah).⁶⁵ If a contract of marriage is made by such related people in the knowledge that these kinds of marriage are absolutely

more times. [M. Zayd al-Abyānī, *Sharḥ al-Aḥkām*, vol. I, p. 51, cf; Ibn Abu Zayd, *Bakūrāt al-Sa'd*, p.36, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakṣiyyah*, p. 84, al-Nawawī, *Minhāj al-Ṭālibīn*, (translated by E.C. Howard), p. 378, cf; al-Ḥāj Hamdī al-A'ẓamī, *al-Muḥāḍarāt fi al-Aḥwāl al-Shakṣiyyah*, p. 88, cf; Ibn Abū Zayd, *Bakūrāt al-Sa'd*, p.36, Ibn Rajab, *al-Qawwā'id*, p.351, al-Kaḥlānī, *Subul al-Salām*, vol. III, p.213, cf; M. Zayd al-Abyānī, *Sharḥ al-Aḥkām*, vol. I, p. 51, cf; al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 183, cf; *Minhāj al-Ṭālibīn*, (translated by E.C. Howard), p. 378, cf; al-Ramlī, *Nihāyat al-Muḥtāj*, vol. VII, p. 173, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakṣiyyah*, p. 84, cf; al-Sharqāwī, *Hāshiyah*, vol. II, p. 340, cf; Ṣubḥī Maḥmasṣānī, *al-Mujtahidūn fi al-Qaḍā'*, p. 110, al-Ḥāj Hamdī al-A'ẓamī, *al-Muḥāḍarāt fi al-Aḥwāl al-Shakṣiyyah*, p. 88, David Pearl, *A Text on Muslim Personal Law*, pp. 46-56, Ahmed Shukri, *Muhammedan Law of Marriage and Divorce*, p. 25.]

⁶⁴Includes the prohibition of a man from marrying any ascendant or descendant of his wife; any former wife of any ascendant or descendant that is the mother of the one's wife and her grandmothers, whether or the father's or the mother's side, daughters, grand-daughters and great grand-daughters of the wife provided that in the marriage from which the affinity has resulted consummation has taken place. A man is also prohibited from marrying the wife of a son or of a son's son or of daughter's son and the wives of fathers and grandfathers. [Syed Khalid Rashid, *Muslim Law*, p. 62, cf; Thomas Patrick Hughes, *Dictionary of Islam*, op.cit., p. 316, David Pearl, *A Textbook on Muslim Personal Law*, pp. 46-56, cf; Ahmed Shukri, *Muhammedan Law of marriage and Divorce*, p. 25, Tanzil ur-Rahman *A Code of Muslim Personal Law*, vol. I, pp.108-109, cf; Gertrude H. Stern, *Marriage in Early Islam*, pp.99-100, M.Zayd al-Abyānī, *Sharḥ al-Aḥkām*, vol. I, p. 51, cf; Aḥmad al-Sāwī, *Bulghat al-Sālik*, vol. I, p. 515, cf; Ibn Abu Zayd, *Bakūrāt al-Sa'd*, p.36, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakṣiyyah*, p. 84, al-Nawawī, *Minhāj al-Ṭālibīn*, (translated by E.C. Howard), p. 378, cf; Ibn Abū Zayd, *Bakūrāt al-Sa'd*, p.36, al-Kaḥlānī, *Subul al-Salām*, vol. III, p.213, cf; Ibn Rajab, *al-Qawwā'id*, p.351, al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 183, cf; al-Ramlī, *Nihāyat al-Muḥtāj*, vol. VII, p. 173, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakṣiyyah*, p. 84, cf; al-Sharqāwī, *Hāshiyah*, vol. II, p. 340, cf; Ṣubḥī Maḥmasṣānī, *al-Mujtahidūn fi al-Qaḍā'*, p. 110, al-Ḥāj Hamdī al-A'ẓamī, *al-Muḥāḍarāt fi al-Aḥwāl al-Shakṣiyyah*, p. 88, Ahmed Shukri, *Muhammedan Law of Marriage and Divorce*, p. 25.]

⁶⁵That is when a child who has been nursed by a woman, it makes it unlawful to marry the foster-mother's offspring. [see Syed Khalid Rashid, *Muslim Law*, p. 62, David Pearl, *A Textbook on Muslim Personal Law*, pp. 46-56, cf; Ahmed Shukri, *Muhammedan Law of marriage and Divorce*, p. 25, al-Kaḥlānī, *Subul al-Salām*, vol. III, p. 213, cf; Gertrude H. Stern, *Marriage in Early Islam*, pp.99-100. However, among the Ḥanafīs certain exceptions have been classified as lawful, for example, marriage between the father of the child and the mother or daughter of his child's foster-mother. Accordingly, the marriage between the foster-mother and the brother of the child whom she has fostered, is also permissible. According to the Ḥanafīs and the Mālikīs, a relationship between foster-mother and child resulting impediments to marriage is established when the child has been suckled, at least once. [M.Zayd al-Abyānī, *Sharḥ al-Aḥkām*, vol. I, p. 51, cf; Aḥmad al-Sāwī, *Bulghat al-Sālik*, vol. I, p. 515.] The general injunction from the text is that a man is prohibited from marrying his foster-relatives when the child has been suckled once or more times. [M. Zayd al-Abyānī, *Sharḥ al-Aḥkām*, vol. I, p. 51, cf; Ibn Abū Zayd, *Bakūrāt al-Sa'd*, p.36, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakṣiyyah*, pp. 84-85, al-Nawawī, *Minhāj al-Ṭālibīn*, (translated by E.C. Howard), p. 378, cf; al-Ḥāj Hamdī al-A'ẓamī, *al-Muḥāḍarāt fi al-Aḥwāl al-Shakṣiyyah*, p. 88, cf; al-Kaḥlānī, *Subul al-Salām*, vol. III, p.213, cf; M. Zayd al-Abyānī, *Sharḥ al-Aḥkām*, vol. I, p. 51, cf; al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 183, cf; al-Ramlī, *Nihāyah al-Muḥtāj*, vol. VII, p. 173, cf; al-Sharqāwī, *Hāshiyah*, vol. II, p. 340, Ibn Rajab, *al-Qawwā'id*, pp.351-352, cf; Ṣubḥī Maḥmasṣānī, *al-Mujtahidūn fi al-Qaḍā'*, p. 110, al-Ḥāj Hamdī al-A'ẓamī, *al-Muḥāḍarāt fi al-Aḥwāl al-Shakṣiyyah*, p. 88.]

forbidden, the offending parties are guilty of zinā and the children will be regarded as illegitimate. However, if such a marriage took place without them being aware of their preclusion from marriage, when the truth came to light, the marriage would be regarded as bāṭil, i.e. it had never really existed, yet the children from such a marriage would still retain their nasab from their father and would not be regarded as illegitimate.

Other matters which undermine the ʿaqd of the marriage so that the marriage is bāṭil or fāsid when they come into light include: marrying two sisters at the same time, marrying one's triple divorced wife without her having had another marriage which has been terminated, marrying an infidel, marrying a fifth wife while still married to four existing wives.⁶⁶ In all these cases, the marriage is bāṭil (void) and if done deliberately involves zinā.⁶⁷ Otherwise, the nasab of the children arising from the marriage will belong to the father and the children will be regarded as legitimate. There are other technical matters which undermine the validity of the marriage but in these cases whether the technicalities were broken knowingly or not, the children are regarded as

⁶⁶Faiz Badruddin Tyabji, *Muhammadan Law*, p. 144, Neil B.E. Baillie, *A Digest of Moohummudan Law*, vol. I, p. 213, cf; Ahmed Shukri, *Muhammedan law of Marriage and Divorce*, pp.30-32, cf; Syed Khalid Rashid, *Muslim Law*, op.cit., pp. 63-64, cf Muhammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, pp. 156-157, cf; Nawab A.F.M Abdur Rahman, *Institutes of Mussalman Law*, op.cit, p. 82, Thomas Patrick Hughes, *Dictionary of Islam*, op. cit., p. 317, cf; A.A.A. Fyze, *Outlines of Muhammadan Law*, p. 94, cf; Ahmed Shukri, *Muhammedan Law of Marriage and Divorce*, p. 32, David Pearl, *A Textbook on Muslim Personal Law*, pp. 46-56, Muhammad Zakariyyā al-Bardisi, *al-Aḥwāl al-Shakhṣiyyah*, pp. 35-36, cf; Ahmad al-Kabisi, *al-Aḥwāl al-Shakhṣiyyah*, p. 311, cf; Umar ʿAbd Allāh, *al-Aḥkām al-Sharʿiyyah*, p. 466, cf; Zakī al-Dīn Shaʿbān, *al-Aḥkām al-Sharʿiyyah*, p. 581.

⁶⁷Ibn Qudāmah, *al-Mughnī*, vol. VII, pp. 431-432.

legitimate even though the marriage is not sound (*ṣaḥīḥ*). These include marrying without a *walī* or two witnesses and marrying without a dower (*mahr*).⁶⁸ The *Majallah* provides:

'A child who is the issue of cohabitation in error (problematic intercourse) is declared legitimate if he is acknowledged, provided that the error is as to the lawfulness of the woman to the husband or as to the marriage contract. The same rule also applies to the child born of cohabitation resulting from error as to the identity of the woman, as for instance where a man cohabits with a woman whom he has been told is his wife while she is not'.⁶⁹

III. Conclusion

The establishment of the *nasab* of the child's legitimacy from his or her father was particularly important in Islamic law. The doctrine of *al-walad li al-firāsh* was interpreted in as general a way as possible in order to provide as great as possible a chance for the child to be regarded as legitimate, whatever the true facts might be. Attempts were made by the use of the evidence of childbirth to make the doctrine *al-walad li al-firāsh* firmer even when the husband had been unaware that his wife had been pregnant. The doctrine of *al-walad li-al-firāsh* was extended so that any child who was born as a result of illegal intercourse could be regarded as legitimate if the parents, or at least the

⁶⁸Al-Khatīb, *al-Iqnāʿ*, p. 418, see also commentary by al-Shaykh ʿIwāḍ and al-Bājūrī printed in the margin of al-Khatīb, *al-Iqnāʿ*, p. 418.

⁶⁹The *Majallah*, article 342.

father, were in ignorance of their mistake.

CHAPTER TWO

ILLEGITIMACY (NASAB GHAYR SHARʿĪ)

I. How Illegitimacy is Established

As already stated, legitimacy of the child in Islām was based on the establishment of legal paternity (*nasab sharʿi*). The status of a child begotten through a legitimate relationship would be regarded as legitimate, hence, he or she would be entitled to receive maintenance, guardianship and inheritance.

An illegitimate genealogical relationship (*nasab ghayr sharʿi*) in Muslim family law denotes any child whose status is not legitimised on the basis of the modes discussed in the previous chapter. According to all the jurists, there are three categories which bring about the illegitimacy of a child.

i. The first category, zinā - is regarded as the strongest reason for the illegitimacy of a child born as a result. Strictly speaking, zinā in Islām occurs through illicit sexual relations - fornication in which both parties are unmarried, or adultery when one or both parties are married. While both parties if the act

is properly witnessed, i.e. four witnesses seeing the act will be punished by the ḥadd penalty, only the unmarried woman will be punished if she becomes pregnant without the act having been witnessed. The resultant offspring will be illegitimate (*walad zinā*).

ii. The second category concerns the offspring arising within a legitimate union where certain features occur which render certain offspring illegitimate. In this category, Muslim jurists have determined four features where if one of them is fulfilled, the child's illegitimacy is confirmed.

1. Imprecation (*li'ān*) - Li'ān can be defined as an oath which brings about divorce. A husband may without legal proof (i.e. four witnesses seeing the act) allege adultery by his wife without becoming liable to punishment for qadhf (the legally unsubstantiated allegation of adultery) and deny the paternity of a child born to his wife.¹ The process of li'ān is an oath sworn by the husband that his wife has committed adultery. This might involve adultery where no pregnancy ensues or the husband might wish to disown the conception of the wife. In her turn, the wife takes an oath to deny it. As already stated, in order to validate the

¹ Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 89, al-Dimashqī, *Kifāyat al-Akhyār*, pp. 42-421, Charles Hamilton, *The Hedaya*, p. 123, Ibn al-Najjār, *Muntahā al-Irādāt*, section 2, p. 334, Subḥī Maḥmaṣṣānī, *Turāth al-Khulafā'*, p.367; Joseph Schacht, see v. 'li'ān' in *EL*, vol. V, pp. 24-26, *EL*, 1961, p. 569, cf; John I. Esposito, *Muslim Family Law in Egypt and Pakistan*, pp.78-79, Ḥammūdah 'Abd al-'Āṭī, *The Family Structure in Islam*, p. 239.

charge made by a husband against his wife, the allegation would normally have to be supported by four witnesses and would involve the ḥadd punishment. By the process of li'cān the solitary evidence of the husband can be accepted for the purpose of divorce if he bears witness four times followed by an oath before God that he is solemnly telling the truth. And the oath should solemnly invoke the curse of God on himself if he is telling a lie. The wife, in her turn, follows the same practice in her denial. As the Qur'ān says:

'And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony. They indeed are evil-doers. Save those who afterward repent and make amends. (For such) lo! Allāh is Forgiving, Merciful. As for those who accuse their wives but have no witnesses except themselves, let the testimony of one of them be four testimonies, (swearing) by Allāh that he is of those who speak the truth. And yet a fifth, invoking the curse of Allāh on him if he is of those who lie'.²

The conjunction of these two rules in the Qur'ān, i.e. the punishment for qadhf and the rule for li'cān, indicate that li'cān was intended to be a means for a husband to divorce his wife when he was sure that she had committed adultery but could not legally prove it. It must be stressed that although a divorce through li'cān involves the accusation of adultery, no ḥadd penalty is involved. Thus, the reason for the husband using this form of divorce, when other forms are readily available to him, must be that he wants to publicly stress his wife's adultery. This

²Q.24 (al-Nūr):4-7.

might come about as a result of bitterness of being cuckolded. However, he would also be drawing the attention of society in general to his spurned position and with the easy availability of the ordinary form of divorce there would be no reason for him to undergo such humiliation. On the other hand, if his wife is pregnant as a result of the adultery, then the true nature of this *li'cān* form of divorce becomes more apparent because according to the doctrine of *al-walad li al-firāsh*, the child of the wife's adultery would be legally entitled to claim paternity from her husband. As a result of *li'cān*, this is no longer possible because, according to all the jurists, there would be no blood-relationship between the husband and the child. The disjunction of the child's *nasab* from a paternal relationship with the husband would be regarded as absolute and this was the reason that the Prophet Muḥammad has adjudicated that the son of the fornicating woman could not be acknowledged by the husband, if the husband claimed that the conception of the child was a result of adultery.³ According to al-Shāfi'ī, if the husband feels the child who was born by his wife is not his, it is his duty to disown the child immediately.⁴ The child of *li'cān* is publicly shown to be illegitimate, the cuckolded husband has no involvement in its maintenance and care and all the other legal provisions which normally exist between father and child. Thus, when there is a legal union between the husband and the wife

³See al-Ṭabarī, *Tafsīr al-Ṭabarī*, vol. XVIII, p. 85, cf. Ibn al-Qayyim, *Zād al-Ma'ād*, vol. IV, p.109.

⁴Al-Nawawī, *Minhāj al-Tālibīn wa 'Umdat al-Muftīn*, p. 103.

but the child has become an issue of dispute between the husband and the wife, as in the case of *li'cān*, the child would be regarded as illegitimate unless the child is acknowledged by the husband, when it would be considered as legitimate. The descent of a child born in a legal union is established from the claimants, i.e. the father, master or the acknowledger, so long as the claimant has sufficient proof. Thus, any child born to any woman where there is a legal union with the husband or master and the husband does not disown the child, the child should be regarded as his even if the wife has been disowned on the basis of *li'cān*.⁵

It is reported that the first *li'cān* occurred when Hilāl b. Umayyah accused his wife of committing adultery with Sharīk bin Samḥā'. The allegation made by Hilāl is reported to have been true because dissolution of the marriage between Hilāl and his wife was confirmed by the Prophet Muhammad.⁶ This is because it is reported that Hilāl's wife refused to invoke the curse, thus, confirming Hilāl's allegation. The Prophet Muḥammad predicted that Hilāl's wife would deliver a curly-haired black child.⁷

⁵ Al-Khaṭīb, *al-Iqnā'*, vol. II, p. 122.

⁶ See for the detail of the subject in Ibn Hajar al-ʿAsqalānī, *Fath al-Bārī*, vol. XXII, pp. 351-371, cf; al-Ṭabarī, *Tafsīr al-Ṭabarī*, vol. XVIII, p. 85.

⁷ *Ṣaḥīḥ Muslim*, (translated by ʿAbdul Hamid Siddiqi), vol. II, pp. 780-781; See also al-Ṭabarī, *Tafsīr al-Ṭabarī*, vol. XVIII, P. 84; cf; al-Sarakhsī, *al-Mabsūṭ*, vol. VII, p. 39, al-Burhānpūrī, *Kanz al-ʿUmmāl*, vol. XV, p. 205.

It should be noted here that if the husband knew that his wife had been unfaithful and that the child born to her was not his, he was not required to use the process of *li'cān*. In terms of strict observance of the letter of the law as interrelated by the jurists, if he did not use the process of *li'cān*, the child would be regarded as his according to the doctrine of *al-walad li-al-firāsh*. The wife's adultery would, then, only have effect if it had been witnessed by four witnesses or if she, for some reason, made a fourfold confession of it to the authorities. Thus, although contrary to the religious spirit of Islām, *nikāh al-istibḍā'*^c could still continue. The matter was, then, one involving the consciences of the participants and their relationship with God.

2. The Period of Gestation after the divorce by or the death of a husband or master - Most Muslim scholars agree that in order to determine a child to be considered as legitimate, the child must have been born at least six months after the marriage took place.⁸ According to the Shāfi'īs, the Mālikīs and Ahmad Ibn Ḥanbal, the wife must give birth at least six months after the marriage contract takes place, the husband and the wife must have been able to be together at the beginning of the period, because 'six months' is the

⁸ Ahmad Ahmad, *Mawḍū'c al-Nasab fī al-Sharī'ah wa al-Qānūn*, p. 270.

minimum period of pregnancy.⁹ We have already mentioned that the child of a divorced woman who had observed *‘iddah* should be regarded as legitimate so long as the conception was not more than two years or four years for the Shāfi‘īs and the Ḥanbalīs respectively and five years for the Mālikīs.¹⁰ Thus, if conception takes place after more than the maximum period of gestation, the *nasab* the child would be regarded as illegitimate as it must have arisen out of *zinā*.¹¹

3. Inability to beget (*‘adam al-quḍrah ‘alā al-injāb*) - According to most of the Shāfi‘īs, when a husband has no ability to beget the child like a eunuch (*majbūb*), a child born to the wife could be regarded as illegitimate because a eunuch, according to them, would not be able impregnate a woman.¹² However, the Shāfi‘ī Abū ‘Ubaydah b. Ḥarbawayh regards the child as legitimate. Al-Iqnā‘ reports:

⁹ Aḥmad Aḥmad, *Mawḍū‘ al-Nasab fī al-Sharī‘ah wa al-Qānūn*, p. 270, Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. IV, p. 171, cf; Sahnūn, *al-Mudawwanat al-Kubrā*, vol. V, p. 125, al-Shāfi‘ī, *al-Umm*, vol. V, p. 222, cf; Ibn Qudāmah, *al-Mughnī*, vol. IX, p. 115, cf; M. Shalabī, *Aḥkām al-Uṣrah*, p. 686.

¹⁰ Cf; p. 16.

¹¹ Ibn ‘Abdīn, *Ḥāshiyat Radd al-Muḥtār*, vol. III, p. 541.

¹² Al-Ramlī, *Mughnī al-Muḥtāj*, vol. VII, p. 127, cf; Ibn Qudāmah, *al-Mughnī*, vol. VII, p. 429-30.

‘Abū ‘Ubaydah b. Ḥarbawayh who held the post of a judge in Egypt adjudicated that the child born to a wife of a eunuch (*majbūb*), should be affiliated to his father. The report says that a eunuch (*mamsūh*), carried his son on his shoulder and wandered about in the Egyptian market and said, "Look at the judge i.e., Abū ‘Ubayd b. Harbawayh who has agreed to affiliating illegitimate children or bastards to slaves. He also agreed to affiliate the child to its father even though the father is a eunuch (*majbūb*) or a castrate (*al-khaṣī*). Thus, the waiting period of the woman whose marriage has been dissolved by *talāq* or the death of a husband who is a eunuch or a castrate, is by delivery of the child since despite the lack of both testicles, the instrument of the semen remains. The availability of both testicles merely enhanced the proceeding of blood circulation. If a dead castrate, at the time of his death leaves a pregnant wife, the child who is born to the woman thereafter, may be affiliated to that man. The waiting period of such a woman therefore, is until delivery because his male sexual organ (*ālat al-jimā‘*) still remained. Moreover, if the husband extensively penetrates his male sexual organ into his partner, the emission may occur even if with little sperm'.¹³

The Mālikīs maintain that his status as a father will depend on the view of the medical experts (*ahl al-ma‘rifah*); if the expert's view is that the eunuch is able to impregnate a woman, the child should be attributed to him, but if the expert's view was the opposite, the child could not be affiliated to him.¹⁴ The rest of the jurists, following the doctrine *al-walad li al-firāsh*, maintain that the child is legitimate.¹⁵

¹³ Al-Khaṭīb, *al-Iqnā‘*, p. 466.

¹⁴ Saḥnūn, *al-Mudawwanat al-Kubrā*, *op.cit.*, vol. II, p. 445, cf; Aḥmad Aḥmad, *Mawqū‘ al-Nasab fi al-Sharī‘ah wa al-Qānūn*, p. 273.

¹⁵ Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. IV, p. 299, cf; K.N. Ahmed, *The Muslim Law of Divorce*, p. 878, al-Sarakhsī, *al-Mabsūṭ*, vol. VI, p. 53, Mahomed Yusoof Khan Bahadur, *Mahomedan Law*, vol. I, p. 133, Ibn Qudāmāh, *al-Mughnī*, vol. VII, pp. 429-30, Aḥmad Aḥmad, *Mawqū‘ al-Nasab fi al-Sharī‘ah wa al-Qānūn*, p. 272.

4. According to the Ḥanafīs, when a master refuses to acknowledge paternity of a child born by his slave girl, the child would be regarded as illegitimate.¹⁶ However, as he owns the slave-girl, the child would also be his slave.

iii. The third category, is the child born of a marriage from a union which the parties know to be unlawful. This includes deliberate marriage to women prohibited from marriage by their close relationship, also deliberate marriage with an idolator, polyandry and taking a fifth wife; these have been discussed earlier.¹⁷

II. The Moral/Religious and Legal Position of the Walad Zinā

i. The Moral/Religious Status of the walad zinā - There appears to have been a degree of dispute about the moral/religious status of the walad zinā among the early traditionists and jurists. They report of Traditions from the Prophet with

¹⁶Al-Marghīnānī, al-Hidāyah, vol. II, p. 68. However, according to the majority of jurists hold that the child of umm al-walad would be regarded as legitimate even if the master does not acknowledge (*di'wah*) the child. [see for example Saḥnūn, al-Mudawwanat al-Kubrā, vol. VIII, p. 23, cf; al-Shāfi'ī, al-Umm, vol. VIII, p. 322, cf; Ibn Qudāmah, al-Mughnī, vol. XII, p. 502, Aḥmad Aḥmad, Muwḍū' al-Nasab fī al-Sharī'ah wa al-Qānūn, p. 276.

¹⁷Cf; pp. 31-34.

regard to the moral/religious status of the walad zinā, which are particularly confusing. In the Muṣannaf of al-Ṣanʿānī, a range of conflicting Traditions seem to reflect a societal attitude against the walad zinā, on the one hand, and an attempt to introduce a more balanced moral view of his position, on the other. This is reflected in Traditions attributed to the Prophet and to the Caliph ʿUmar.

On the one hand, ʿAbd Allāh b. ʿAmr reports from the Prophet that the walad zinā will not enter Heaven.¹⁸ Ṭāwūs is also reported as having spoken harshly about the destiny of the walad zinā in the Hereafter.¹⁹ Another Tradition from Wahb claims that he had read in some books that walad al-zinā would not enter Heaven up to the seventh generation and that God lightened that for this ummaḥ and made it up to the fifth generation.²⁰ Abū Hurayrah is said to have believed that the walad zinā was the most evil of the three involved in his birth; i.e. he was more evil than his mother and father.²¹ In another extraordinary Tradition attributed to the Prophet on the authority of ʿIkrimah, it is claimed that when the people called out to the father of a walad zinā that he was the worst of the three, the Prophet contradicted them and said that he was the best of the

¹⁸ Al-Ṣanʿānī, al-Muṣannaf, vol. VII, p. 454, al-Bayhaqī, al-Sunan al-Kubrā, vol. X, p.58.

¹⁹ Al-Ṣanʿānī, al-Muṣannaf, vol. VII, p. 454.

²⁰ Al-Ṣanʿānī, al-Muṣannaf, vol. VII, p. 455.

²¹ Al-Ṣanʿānī, al-Muṣannaf, vol. VII, p. 454.

three. The people changed that to the walad zinā being the worst of the three.²²

On the other hand, we see ʿĀ'ishah denying that the walad zinā is the worst of the three and arguing that the blame for his parents' action should not be put on him, using the Qur'ānic text, 'no bearer of a burden can bear the burden of another...' [al-Anʿam :164].²³ In addition, Ibn ʿUmar also denies Abū Hurayrah's claim that the walad zinā was the worst of the three and claims he was the best of the three.²⁴

There is little or nothing in the literature on this subject after al-Ṣanʿānī's (d.211) Muṣannaf until al-Bayhaqī (d.458). This might suggest that because of the nature of this dispute and the hostile attitude among the more 'upright' in society, it was deemed better to ignore it. However, al-Bayhaqī returns to the discussion quoting the Traditions on both sides of the dispute which al-Ṣanʿānī has reported.²⁵ In addition to the Traditions of al-Ṣanʿānī on the walad zinā not entering heaven, he quotes other ḥadīth which explains that this means that if the walad zinā behaves in the same way as his parents, he will not enter

²² Al-Ṣanʿānī, al-Muṣannaf, vol. VII, p. 455.

²³ Al-Ṣanʿānī, al-Muṣannaf, vol. VII, p. 454.

²⁴ Al-Ṣanʿānī, al-Muṣannaf, vol. VII, p. 455.

²⁵ Al-Bayhaqī, al-Sunan al-Kubrā, vol. X, pp. 58-59, cf; al-Ṣanʿānī, al-Muṣannaf, vol. VII, pp. 453-455. .

paradise.²⁶ Al-Bayhaqī also provides a commentary on the statement that the Prophet said that the walad zinā was the worst of the three. He maintains:

'That the words do not have a general meaning but refer to a hypocrite who was causing trouble for the Prophet. The Prophet asked who would give him relief from such a person. He was told that the man, in addition to his attitude, was a walad zinā. At this, the Prophet commented that this man (i.e. the troublesome hypocrite) was the worst of the three'.

Thus, al-Bayhaqī by this description suggests that it was only this particular walad zinā who was the worst of the three, and he was that by virtue of his attitude towards the Prophet. In support of this he quotes the Prophet repeating the Qur'ānic phrase that ʿĀ'ishah had quoted *'no bearer of a burden can bear the burden of another...[al-Anʿām :164].'*²⁷ This seems to indicate that any idea of the walad zinā being condemned for the sins of his parents is not acceptable - at least morally. However, the existence of the traditions suggests that there was a natural disposition to condemn the walad zinā which was not based on morality/religion.

ii. The Legal Status of the walad zinā - The arguments among Traditionists and jurists about the legal status of walad zinā reflect the argument about the walad

²⁶ Al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, pp. 58-59, cf; al-Ṣanʿānī, *al-Muṣannaf*, vol. VII, pp. 453-455.

²⁷ al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, pp. 58-59.

zinā's religious and moral status. The main statements highlighted by the Traditionists and jurists have focused on the followings: (i) nasab of the walad zinā, (ii) maintenance and care, (iii) bloodwit (*diyah*), (iv) inheritance (v) marriage, (vi) leading the prayer (*imāmat al-ṣalāh*), (vii) giving testimony, (viii) slavery and manumission, and (ix) ṣalāt al-janāzah. As will be seen, the first five of these are directly connected with the nasab of the walad zinā while the others are outside that legal aspect.

1. The nasab of the walad zinā - All Muslim jurists hold that the nasab of the child of zinā or li'cān would be attributed to his/her mother's kinsfolk (*qawm*).²⁸ This is because, as already stated, the illegitimate child has no relationship of nasab from the father and there would be no walā' from the father's side (*jānib al-'ab*).²⁹ Therefore, according to all the jurists, the illegitimate child would be associated (*mansūb*) to his/her mother's kinsfolk,³⁰ the mother's walī, before her marriage, if she had been married, would be the child's walī. The child would

²⁸*Futāwā Alumghiri*, vol. IV, chapter XIV, P. 174; See also, Neil B.E. Baille, *A Digest of Moohummudan Law*, p. 415, al-Sarakhsī, *al-Mabsūt*, vol. VII, p. 123, S. Ameer Ali, *Student's Handbook of Mahommedan Law*, p.76, Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 266, M. Zayd al-Abyānī, *Sharḥ al-Aḥkām al-Shar'iyyah*, vol. II, p. 10.

²⁹See footnote 30.

³⁰Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 266, al-Sarakhsī, *al-Mabsūt*, vol. VII, p. 123, *Futāwā Alumghiri*, vol. IV, p. 174; Neil B.E. Baille, *A Digest of Moohummudan Law*, p. 415.

also be associated to her walā', if she was a client (*mawlā*).³¹ Therefore, when a man has committed zinā with a woman and she delivers a son, even if he claims that he is the father, this would not be accepted because the descent of the illegitimate child is established from the woman by birth. Accordingly, when a man claims the paternity of such a child, whose mother is a slave and in the possession of another, the child's nasab is not established from him because such a child is considered to be illegitimate (*walad zinā*).³² However, if the man should subsequently, by any means, be proved to be the proprietor of its mother, the child is emancipated although the mother of the child would not become umm al-walad. However, if he said, "This is my son by wickedness", or, "I did wickedly with her and she gave birth to this child", or, "This is my son by what is not right",³³ the child would not have his nasab. But if the claimant should say, "He is my son", without adding, "by zinā"- the child having no other father - and should he afterwards become his proprietor, the child's descent from the claimant would be established, and the child would be free. In like manner, if the man should say, "He is my son by an invalid (*fāsid*) marriage or `invalid (*fāsid*)

³¹ Al-Sarakhsī, *al-Mabsūt*, vol. VII, p. 123, *Futāwā Alumghiri*, vol. IV, p. 174; Neil B.E. Baillie, *A Digest of Moohummudan Law*, p. 415, al-Shāfi'ī, *al-Umm*, vol. IV, p. 86. On this, see the discussion on walā' page chapter

³² See *Futāwā Alumghiri*, vol. IV, chapter XIV, P. 174; See also, Neil B.E. Baillie, *A Digest of Moohummudan Law*, p. 415.

³³ *Futāwā Alumghiri*, vol. IV, chapter XIV, P. 174; See also, Neil B.E. Baillie, *A Digest of Moohummudan Law*, p. 415.

sale³⁴ or he should claim him under problematic intercourse (*waṭ' shubhah*), his descent would not be established so long as he continues in the possession of another; but if the man himself should afterwards become the proprietor of the child, the child's descent from him would be established, and the child would be free; and his mother also, if she should come into the man's possession, would become his *umm al-walad*³⁴.

In the words of Subḥī Maḥmaṣṣanī, the status of the child of *zinā* must be ascribed to its mother and the *nasab* of the mother.³⁵

Some may consider that it is somewhat strange that it is the mother's *nasab* that the child takes and not the actual father, i.e. the other party to the adultery. However, in legal terms, the only way that such a situation might have been able to occur was by the actual father admitting his adulterous act and the child of that act being confirmed as his by the process of *qiyāfah*. Proper admission of adultery, i.e. four separate confession of it by the actual father, would result in him receiving the *ḥadd* penalty. Therefore, there was no encouragement for any but a 'pious' adulterer to confess. The woman's

³⁴See *Futāwā Alumghiri*, vol. IV, chapter XIV, P. 174; See also, Neil B.E. Baillie, *A Digest of Moohummudan Law*, p. 415.

³⁵See Subḥī Maḥmaṣṣanī, *Turāth al-Khulafā'*, p. 182.

accusation that he was the father would have no effect in law without four witnesses to their adultery. We have seen that qiyāfah is not allowed to contradict the doctrine of al-walad li al-firāsh when there is no admission of adultery.³⁶ Therefore, the same would have to be the case in a matter of adultery outside that doctrine. Thus, the preponderance of the legal circumstances necessitate that the nasab of the illegitimate child should be attributed to the mother whose birth of the illegitimate child is the only certain fact in the case.

2. Maintenance and Care (ḥaḍānah) of the walad zinā

It is clear from the previous discussion of the nasab of the walad zinā and walad li'ān, that the responsibility for care and maintenance must reside with those to whom the child's nasab is attributed. Thus just as the nasab of the walad zinā and walad li'ān belongs with the mother and her family, so does the responsibility for care and maintenance.³⁷

In the case of li'ān, the Mālikīs are quoted as saying that a woman who was divorced by her husband through li'ān has no right to claim maintenance from her husband, even if she is pregnant, because the inviolability (ʿiṣmah) of

³⁶Cf; chapter 1, pp. 12-15. See further discussion on physiognomy in chapter 4, pp. 139-146.

³⁷Seymour, Vesey Fitzgerald, Muhammadan Law - An Abridgement, p.98.

the woman has been regarded as having been terminated as a result of the alleged activities which led to *li'ān*. This is because, a woman would be entitled to claim maintenance from her husband as long as her pregnancy is associated with him as the owner of the waiting period (*ṣāhib al-ʿiddah*). Therefore, according to the Mālikīs, a husband, who accused his wife of committing adultery (*mulā'in*) which had resulted in pregnancy but then he acknowledged paternity of the child, would be liable for *ḥadd* punishment for slander (*qadhf*) but the child could be affiliated to him (*al-mulā'in*). The mother would be liable for providing maintenance of the child before the acknowledgment of paternity was made even though the father was rich (*mūsir*) at that time.³⁸

On the other hand, the Shāfi'īs, are reported to have said that if a father disowned the child born to his wife but later acknowledged the child's paternity, the mother for the child would still be responsible for providing maintenance and care for the child, not the father.³⁹ Thus, they make the first statement of the husband invalidate his second statement, i.e. his change of mind. This would be similar to the case of the mother having to provide maintenance for the child of *li'ān* who was not acknowledged by her former husband. In the event of the mother providing maintenance for the child without a judge's sanction and she

³⁸ Al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, p. 98.

³⁹ Al-Khaṭīb, *al-Iqnāʿ*, p. 481, cf; al-Ramlī, *Nihāyat al-Muḥtāj*, vol. VII, p. 220.

needed to borrow money from her former husband, the amount paid by her husband would be regarded as the woman's debt owed to that husband. Thus, if her loan was witnessed, the judge has to adjudicate that the husband has the right to recover the sum from his former wife.⁴⁰ Strictly speaking, according to the Mālikīs, a pregnant woman who has been divorced by *li'cān* cannot be entitled to maintenance because her pregnancy does not affiliate the child to her husband. Therefore, as far as the maintenance of the child is concerned, *li'cān* is based on the situation of a witnessed adultery - as if four witnesses had been present. However, if the wife was already six months pregnant when the *li'cān* or the actual witnessing of her adultery took place, the child is entitled to maintenance from the husband.⁴¹ Presumably, this is on the grounds that the belatedness of the *li'cān* of the witnessed adultery after conception has taken place means that there is a strong possibility that the child is his, despite the mother's later adultery. The reverse situation arises in terms of the husband who had caused the *walad zinā* to be illegitimate by *li'cān*. The *walad zinā* would not be responsible for providing maintenance for the husband (since he was not his father, according to the law). The responsibility of providing maintenance on the basis of parentage (*nasab*) could not be applied (*irtifā'*) as the child has been disowned by its father and was regarded as a child of *li'cān*. There is no legal

⁴⁰ Al-Khatīb, *al-Iqnā'*, p. 481.

⁴¹ Ahmad al-Ṣāwī, *Bulghat al-Sālik*, vol. I, p. 523.

relationship between the father (!) and the son (!).⁴²

According to Abū Ḥanīfah, if a pregnant woman is proved guilty of zinā, the ḥadd punishment cannot be inflicted on her until she has delivered her child. In addition, ḥadd penalties cannot be carried out on her immediately after delivery unless the new born baby would have someone else able to give suckling.⁴³

In all of these cases, there is a strong probability that the woman who has to provide maintenance for the illegitimate child would not have the means to do so. As the illegitimate child's nasab has been associated with the mother, as already mentioned, the mother's walī and immediate agnates, e.g. father, brother, uncle, cousin would take over the responsibility, because, as we will see later, they are involved in mutual inheritance with the illegitimate child. Thus, the transference of nasab to the mother would mean that the mother's walī would become the illegitimate child's walī. This would seem to be the theoretical legal background to the maintenance of the illegitimate child. However, this may not have always actually taken place as the result of the shame that the adultery or fornication of the woman brought to her family. Thus, it seems that the plight of

^{42c}Abd al-ʿAziz, ʿĀmir, *al-Aḥwal al-Shakhṣiyyah*, p. 141.

⁴³Al-Māwardī, *al-Aḥkām al-Sultāniyyah*, p.225.

both mother and child might be a life of poverty and perhaps corruption.

The care of the child, which will include suckling it, feeding it and providing it with as comfortable an atmosphere as possible is always the responsibility of the mother in marriage, although her husband is required to provide the means for this to take place. In the case of an illegitimate child, this duty of care (*ḥaḍānah*) is still required of the mother. In the case of the mother divorced by *li'cān* or those whose illegitimate children have been born as a result of fornication by consent (i.e. they were unmarried virgins previously), this duty still rest upon the mothers who should be supported by her family and her *walī*. However, in the case of a woman who has been married being convicted of *zinā*, they are given a remission of two years to suckle the child before they are stoned to death. The responsibility for care (*ḥaḍānah*) will then fall on the woman's family, particularly her close female relatives, like mother, grandmother and sisters.⁴⁴ The Islamic jurists do not seem to have discussed what would happen if the woman's family rejected her and her child. It seems that, in this case, it should be the duty of *bayt al-māl* or the state to intervene but this is not explicitly stated.

⁴⁴See for example, al-Khaṭīb, *al-Iqnā'*, pp. 489-493, see also Shaykh 'Iwāḍ's commentary printed in the margin of al-Khaṭīb, *al-Iqnā'*, pp. 489-493, Muwaffaq al-Dīn Ibn Qudāmah, *Umdat al-Fiqh*, pp. 108-109, al-Ramlī, *Nihāyat al-Muḥtāj*, vol. VII, p. 220, Ibn Qayyim, *Zād al-Ma'ād*, vol. IV, pp. 432-437, 'Abd al-'Aziz 'Āmir, *al-Aḥwāl al-Shakhṣiyyah*, p. 141. Thus, a father, who denied (*al-nāfi*) that the child was his, would not be responsible for providing maintenance for that child.

In cases of a child being born as a result of rape, the jurists appear to be silent on whether the child would be regarded as legitimate or illegitimate. However, it would seem impossible that the child should be regarded as legitimate. There are two reports in the *Muwatta'* explicitly stating what would happen to the woman committing *zinā* by force, i.e. rape (*mustakrahah bi al-zinā* or *mughtaşbah*), the *ḥadd* punishment would be inflicted on her if she could not provide proof that she had really been forced to commit *zinā* but the raped woman is entitled to receive dower (*mahr*) from the rapist. *Al-Muwatta'* reports:

'Mālik related to me from Ibn Shihāb that 'Abd al-Malik Ibn Marwān gave a judgement that the rapist had to pay the raped woman her bride-price. Yahyā said that he heard Mālik say, "What is done in our community about the man who rapes a woman, virgin or non-virgin, if she is free, is that he must pay the bride-price of the like of her. If she is a slave, he must pay what he has diminished of her worth. The ḥadd punishment in such cases is applied to the rapist, and there is no punishment applied to the raped woman. If the rapist is a slave, that is against his master unless he wishes to surrender him".⁴⁵

The second report concerns a woman who is pregnant and claims that she has been raped. *Al-Muwatta'* reports:

'Mālik said, "The position with us about a woman who is found to be pregnant and has no husband and she says, 'I was forced', or she says,

⁴⁵*Al-Muwatta'*, p. 630, cf. Mālik b. Anas, *al-Muwatta'*, (translated by Aisha Abdurrahman Bewley), p. 343.

'I was married', is that it is not accepted from her and the ḥadd is inflicted on her unless she has a clear proof of what she claims about the marriage or that she was forced or she comes bleeding if she was a virgin or she calls out for help so that someone comes to her and she is in that state or what resembles it of the situation in which the violation occurred". He said, "If she does not produce any of those, the ḥadd is inflicted on her and what she claims of that is not accepted from her". Mālik said, "A raped woman can not marry until she has restored herself by three menstrual periods". He said, "If she doubts her periods, she does not marry until she has freed herself of that doubt".⁴⁶

As for the Ḥanafīs, Shāfi'īs and Ḥanbalīs, Ibn Qudāmah says:

'The ḥadd punishment cannot be inflicted on woman who having no husband or is (not under the ownership of a) sayyid gets pregnant. If she claims that she has been forced to commit zinā, or has had problematic sexual intercourse (waṭ' shubhah) or she does not admit committing zinā. This is the view of Abū Ḥanīfah and al-Shāfi'ī. In contrast, Mālik holds that such a woman should be punished if she is resident and not a stranger. However, if there are signs (that the woman has been forced for zinā) like she comes screaming for help or shrieking, (the ḥadd cannot be inflicted on her)".⁴⁷

Thus, it would appear that Mālik seems to be more demanding of evidence for rape than the Ḥanafīs and Shāfi'īs. It would appear that when the rape is established, the raped woman receives the appropriate dower. This would help towards the maintenance of the child but it would appear that the rapist is escaping much of his responsibility, whether or not the ḥadd of stoning

⁴⁶*Al-Muwatta'*, p. 716, cf; Mālik b. Anas, *al-Muwatta'*, (translated by Aisha Abdurrahman Bewley), p. 392.

⁴⁷Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. X, p. 192.

is administered on him because the child he brought into existence by his violent sexual act is not being paid for out of his wealth.

It is useful to describe the children who are regarded as illegitimate in Islamic law and who will be responsible for their maintenance. The first category are those born to married mothers who conceived them in a properly witnessed act of adultery. Their mothers will be liable to the ḥadd punishment of stoning after the children have been suckled. Their maintenance and legal status will then belong to the families of the mothers. The second category is those born to the ṭhayyib, that is a divorcee or a widow, who has not remarried. In her case, she would be condemned to the ḥadd punishment of stoning, if she was properly witnessed in the act of adultery or if she gave birth to a child outside the possible limits of her ʿiddah. Any child that she gave birth to would become the responsibility of her walī and her family. The third category are children whose illegitimacy has been made known by liʿān. The mothers are not liable to the ḥadd punishment for witnessed adultery and will be responsible together with their families for the child's maintenance and care. The fourth category are those who are born to unmarried mothers who give birth to them whether their fornication was witnessed or not. These women will be liable for the ḥadd punishment of flogging but they will have to continue their duty of care and maintenance for the children and they ought to be supported by their families.

3. Bloodwit (*diyah*) for the walad zinā

In the case of the child committing any crime involving diyah, his/her mother's kinsfolk will be liable for the payment of bloodwit (*diyah*), that is the responsibility of that particular diyah must be referred to the ‘āqilah of the child's mother.⁴⁸ This arises directly out of the fact that the walad zinā's nasab has been attributed to the mother and her family.

4. Inheritance of the walad zinā

The majority of the schools of law are in agreement to declare that the child of zinā cannot inherit from the former husband of the mother because there is no nasab relationship between him and the child, which is the basis of the designated heirs.⁴⁹ Furthermore, all the jurists maintain that due to fact that the nasab of the walad zinā has been attributed to the mother and her family, the walad zinā not only is allowed to inherit from his/her mother,⁵⁰ but also from any

⁴⁸Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 266, al-Sarakhsī, *al-Mabsūṭ*, vol. VII, p. 123, *Futāwā Alumghiri*, vol. IV, p. 174; Neil B.E. Baillie, *A Digest of Moohummudan Law*, p. 415, cf; Şubhī Maḥmaṣṣānī, *Turāth al-Khulafā'*, p.182.

⁴⁹Reuben Levy, *The Social Structure of Islam*, p. 147, cf; Syed Ameer Ali, *Student's Handbook of Mahommedan Law*, p. 68-69.

⁵⁰Al-Burhānpūrī, *Kanz al-‘Ummāl*, vol. XV, p. 204, al-Shāfi‘ī, *al-Umm*, vol. II, p. 82, al-Zurqānī, *Sharḥ al-Zurqānī*, vol. III, pp.123-4; 193, al-Sarakhsī, *al-Mabsūṭ*, vol. VII, p. 123, Reuben Levy, *The Social Structure of Islam*, p. 147, cf; N.J.Coulson, *Succession in the Muslim Family*, p.173, cf; M.Jawād Maghniyah, *al-Aḥwāl al-*

other designated heirs of the mother, including her sisters and her agnates (ʿaṣabah).⁵¹ They also enjoy reciprocal rights of inheritance from the child.⁵² Thus, the father of the child would not be allowed to inherit from the illegitimate child as clearly stated in the *ḥadīth* of the Prophet Muḥammad which says:

‘Any man who commits zinā (ʿāḥar) with a free woman or a slave, the child [of such ʿāḥar] is considered as a child of *zinā*, the child cannot inherit from its father and the father also cannot inherit from him/her’.⁵³

This is clearly because the father is not associated with the *walad zinā* in any legal aspect of the *walad zinā* concerned with *nasab*.

Shakhṣiyyah, p. 246, cf; Ibn Qudāmah, *al-Mughnī*, vol. VII, p. 121, Syed Ameer Ali, *Student's Handbook of Mahommedan Law*, p. 76-69, William H. Macnaghten, *Principles of Muhammadan Law*, ch.II, p. vi, Abū al-Walid Sulayman al-Bājī, *Kitāb al-Muntaqī - sharḥ Muwaṭṭaʿ*, vol. IV, pp. 82-83, Knyvet Wilson, *A Digest of Anglo-Muhammadan Law*, p. 220, Qāḍī Abū Yūsuf, *Kitāb al-Āthār*, p. 168, al-Shaybānī, *Kitāb al-Āthār*, pp. 154-155.

⁵¹ Syed Ameer Ali, *Student's Handbook of Mahommedan Law*, p. 76-69, William H. Macnaghten, *Principles of Muhammadan Law*, ch.II, p. vi, Abū al-Walid Sulayman al-Bājī, *Kitāb al-Muntaqī - Sharḥ Muwaṭṭaʿ*, vol. IV, pp. 82-83, Knyvet Wilson, *A Digest of Anglo-Muhammadan Law*, p. 220, al-Shaybānī, *Kitāb al-Āthār*, pp. 154-155, al-Burhāpūrī, *Kanz al-Ummāl*, vol. XV, p. 204, al-Shāfiʿī, *al-Umm*, vol. II, p. 82, al-Zurqānī, *Sharḥ al-Zurqānī*, vol. III, pp.123-4, al-Sarakhsī, *al-Mabsūṭ*, vol. VII, p. 123, Reuben Levy, *The Social Structure of Islam*, p. 147, cf; N.J.Coulson, *Succession in the Muslim Family*, p.173, cf; M.Jawād Maghniyah, *al-Aḥwāl al-Shakhṣiyyah*, p. 246, cf; Ibn Qudāmah, *al-Mughnī*, vol. VII, p. 121, al-Zurqānī, *Sharḥ al-Zurqānī*, vol. III, p. 193.

⁵² Ibn Qudāmah, *al-Mughnī*, vol. VII, p. 121.

⁵³ Al-Tirmidhī, *al-Jāmiʿ al-Ṣaḥīḥ*, vol. IV, p. 428, al-Qazwīnī, *Sunan Ibn Mājah*, vol. II, p.917, cf; al-Jaṣṣās, *Aḥkām al-Qurʾān*, vol. III, p. 246.

5. The Marriage of the walad zinā

Muslim scholars do not have a consensus on matters relating to the girl child of zinā as to whether her actual biological father of such a child could be allowed to marry her. For instance, the Shāfi'īs and some of the Mālikīs are reported to have declared that such a man is allowed to marry the illegitimate daughter, sister's daughter, daughter's daughter, daughter's brother and daughter's sister.⁵⁴ This is because, according to them, those women are legally considered unrelated (*ajnabiyyah*),⁵⁵ and this nullifies the Qur'anic prohibition of marriage with those who are biologically related (*maḥārim*). Thus, the biological father is not allowed to inherit from her nor has the daughter the right to claim maintenance from the physical father. However, Mālik is reported to have withdrawn his previous view and stressed that the father is prohibited to marry his child of zinā and the sexual intercourse which takes between him and his illegitimate daughter would be regarded as unlawful. This view is reported to have been agreed by the Mālikīs.⁵⁶ The Ḥanafīs and the Ḥanbalīs are of the view that the biological father would be strictly prohibited from marrying his

⁵⁴ Al-Jazirī, *al-Fiqh 'alā al-Madhāhib al-Arba'ah*, vol. IV, pp. 63-67, cf; M. Jawad Maghniyah, *al-Aḥwāl al-Shakhṣiyyah*, p. 26, Reuben Levy, *The Social Structure of Islam*, p. 139.

⁵⁵ M. Jawad Maghniyah, *al-Aḥwāl al-Shakhṣiyyah*, p. 26, cf; Reuben Levy, *The Social Structure of Islam*, p. 139, cf; al-Jazirī, *al-Fiqh 'alā al-Madhāhib al-Arba'ah*, vol. IV, pp. 63-67.

⁵⁶ Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. I, p. 516.

illegitimate daughter. This is because, even though from the viewpoint of the canonical law of Islām the girl was not regarded as related to him, i.e. she did not derive her nasab from him, in fact, she was the production of the father's illicit sexual intercourse with her mother.⁵⁷ According to the Ḥanbalīs, it is reported that Aḥmad Ibn Ḥanbal was told of a man who had committed zinā with a woman. As a result, the woman gave birth to a child. That man, i.e. the father, later married his illegitimate child. When the matter was referred to Aḥmad Ibn Ḥanbal, he was reported to have adjudicated that the man should be killed because the man's position (*manzilah*) was regarded as like a Muslim who turned from the Islāmic religion (*murtadd*). However, Qādī Abū Ya'ālā, while commenting on this view, says:

'It would be sufficient to categorise the sexual intercourse which takes place between the father and the illegitimate daughter as unlawful, as he knows that the child is his daughter outwardly (fī al-ẓāhir) although the nasab of the child is from another person'.⁵⁸

iii. Other Legal Aspects of the Walad Zinā

1. Leading the Prayer - There was disagreement among the early jurists about

⁵⁷Cf. al-Jazīrī, *al-Fiqh 'alā al-Madhāhib al-Arba'ah*, vol. IV, pp. 63-67, M. Jawād Maghniyah, *al-Aḥwāl al-Shakhsiyyah*, p. 26, cf. Reuben Levy, *The Social Structure of Islam*, p. 139.

⁵⁸Al-Dimashqī, *al-Ikhtiyārāt al-Fiqhiyyah*, p. 210.

whether it was possible for the walad zinā to lead the prayer. Some of early scholars hold that the walad zinā should be allowed to lead the prayer as long as he is an upright person.⁵⁹ This view is held by Ibrāhīm al-Nakha'ī,⁶⁰ Ḥasan al-Baṣrī,⁶¹ al-Sha'cībī,⁶² 'Aṭā' b. Abī Rabāh,⁶³ Sulaymān b. Mūsā,⁶⁴ al-Zuhri,⁶⁵ Ishāq b. Rāhawayh,⁶⁶ and 'Amr b. Dīnār.⁶⁷ A clear example which we have of the walad zinā leading the prayer is that of Ziyād b. Abīhi whose mother was a prostitute from al-Ṭā'if who had a relationship with Abū Sufyān before he

⁵⁹ Al-Zurqānī, *Sharḥ al-Zurqānī*, vol. I, p. 276, al-Bayhaqī, *al-Sunan al-Kubrā*, vol. III, p. 91.

⁶⁰ Al-Bayhaqī, *al-Sunan al-Kubrā*, vol. III, p. 91, Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59, al-Maqdisī, *al-Sharḥ al-Kabīr*, printed in the margin of Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59, al-Ṣan'ānī, *al-Muṣannaf*, vol. II, p. 396. According to Ibrāhīm al-Nakha'ī, the illegitimate person should be allowed to lead the prayers so long as he regularly performs five daily prayers.

⁶¹ Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59, al-Maqdisī, *al-Sharḥ al-Kabīr*, printed in the margin of Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59.

⁶² Al-Bayhaqī, *al-Sunan al-Kubrā*, vol. III, p. 91.

⁶³ Qādī Abū Yūsuf, *Kitāb al-Āthār*, p. 56, al-Bayhaqī, *al-Sunan al-Kubrā*, vol. III, p. 91, al-Ṣan'ānī, *al-Muṣannaf*, vol. II, p. 396.

⁶⁴ Al-Ṣan'ānī, *al-Muṣannaf*, vol. II, p. 396, Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59, al-Maqdisī, *al-Sharḥ al-Kabīr*, printed in the margin of Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59.

⁶⁵ Al-Bayhaqī, *al-Sunan al-Kubrā*, vol. III, p. 91, Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59, al-Maqdisī, *al-Sharḥ al-Kabīr*, printed in the margin of Ibn Qudāmah, *al-Mughnī*, vol. II, p. 58.

⁶⁶ Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59, al-Maqdisī, *al-Sharḥ al-Kabīr*, printed in the margin of Ibn Qudāmah, *al-Mughnī*, vol. II, p. 58.

⁶⁷ Al-Ṣan'ānī, *al-Muṣannaf*, vol. II, p. 396, Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59, al-Maqdisī, *al-Sharḥ al-Kabīr*, printed in the margin of Ibn Qudāmah, *al-Mughnī*, vol. II, p. 58.

became a Muslim.⁶⁸ The result of that relationship is said to have been Ziyād. Later, Mu'āwiyah tried to make his position more regular by declaring that he was his brother.⁶⁹ This process will be discussed later.⁷⁰ As 'Alī's governor in Fars, one of Ziyād's duties would have been to lead the prayer. This seems to reinforce the view that, at least, in the early days of the Islamic empire, the attitude to the walad zinā leading the prayer was not hostile.

However, Mālik put forwards a Tradition that 'Umar b. 'Abd al-'Azīz is said to have summoned a person of an unknown father who had been leading the prayers in al-'Aqīq (near Madīnah) and to have prohibited him from serving again as imām.⁷¹ This attitude, the walad zinā leading the prayers was ascribed to Mālik and al-Shāfi'ī who all regarded it as reprehensible (*makrūh*) and later it was adopted by the Ḥanafīs, the Mālikīs and the Shāfi'īs generally.⁷²

⁶⁸W. Robertson Smith, *Kinship and Marriage*, p. 287, W.Montgomery Watt, *The Majesty That was Islam*, p. 19.

⁶⁹W.Montgomery Watt, *The Majesty That was Islam*, p. 19.

⁷⁰*Cf.* chapter 4, pp. 137-144.

⁷¹Al-Zurqānī, *Sharḥ al-Zurqānī*, vol. I, p. 276, Saḥnūn, *al-Mudawwanat al-Kubrā*, vol. I, p. 86, al-Shāfi'ī, *al-Umm*, vol. I, p. 193, al-Shīrāzī, *al-Muhadhdhab*, vol. I, p. 99, al-Bayhaqī, *al-Sunan al-Kubrā*, vol. III, p. 90, *cf.* Etan Kohlberg, 'The Position of walad zinā in Imamism Shi'ism', pp. 256-258.

⁷²Al-Shāfi'ī, *al-Umm*, vol. I, p. 193, Etan Kohlberg, 'The Position of walad zinā in Imamism Shi'ism', pp. 256-258, al-Jazīrī, *al-Fiqh 'alā al-Madhāhib al-Arba'ah*, vol. I, pp. 43-431, Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59, al-Maqdisī, *al-Sharḥ al-Kabīr*, printed in the margin of Ibn Qudāmah, *al-Mughnī*, vol. II, p. 58, al-Ramlī, *Nihāyat al-Muḥtāj*, vol. II, p. 182, al-Shubrāmilī, *Ḥāshiyah*, printed in the margin of al-Ramlī, *Nihāyat al-Muḥtāj*, vol. II, p. 182, al-Sarakhsī, *al-Mabsūṭ*, vol. I, p. 41, Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. I, p. 158, Aḥmad al-Dardīr, *Aqrab al-Masālik* printed in the margin of Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. I, p. 158,

According to Mālik and al-Shāfi'ī, the reason why they hold that the walad zinā being an imām was reprehensible (*makrūh*) is because the walad zinā is of an unknown father (*lā yu'raf abūh*).⁷³ As far as this prohibition of the walad zinā leading the prayer is concerned, al-Zurqānī, the later Mālikī commentator on the Muwatta', maintains:

'Mālik regarded it as reprehensible (*makrūh*) for the walad zinā to serve as an imām rātib, i.e. imām who officiates the five daily prayers, but not the one who serves as imām of superogatory (*nawāfil*) prayers, (i.e. it is not reprehensible).'⁷⁴

Further he says:

'This is because, according to Mālik, if the walad zinā is allowed to lead the prayers it would bring about gossip among the people (*ma'raḍ li kalām al-nās*) which, in effect, is sinful'.⁷⁵

In other words, Mālik appears to be suggesting that the walad zinā leading the prayer would cause the people to commit a sin by talking maliciously

Aḥmad al-Dardīr, Aqrab al-Masālik, p. 26.

⁷³ Al-Shāfi'ī, al-Umm, vol. I, p. 193, al-Bayhaqī, al-Sunan al-Kubrā, vol. III, p. 90, al-Zurqānī, Sharḥ al-Zurqānī, vol. I, p. 276, cf. Etan Kohlberg, 'The Position of walad zinā in Imamism Shi'ism', pp. 257, al-Jazirī, al-Fiqh 'alā al-Madhāhib al-Arba'ah, vol. I, p. 431.

⁷⁴ Al-Zurqānī, Sharḥ al-Zurqānī, vol. I, p. 276, cf. Etan Kohlberg, 'The Position of walad zinā in Imamism Shi'ism', p. 256, al-Jazirī, al-Fiqh 'alā al-Madhāhib al-Arba'ah, vol. I, p. 431, Aḥmad al-Dardīr, Aqrab al-Masālik printed in the margin of Aḥmad al-Ṣāwī, Bulghat al-Sālik, vol. I, p. 158, see also Aḥmad al-Ṣāwī, Bulghat al-Sālik printed together with Aḥmad al-Dardīr, Aqrab al-Masālik, vol. I, p. 158.

⁷⁵ Al-Zurqānī, Sharḥ al-Zurqānī, vol. I, p. 276, cf. Etan Kohlberg, 'The Position of walad zinā in Imamism Shi'ism', pp. 256-258.

about him. The Mālikīs further argue that generally the walad zinā is not knowledgeable in religion.⁷⁶ Al-Bājī (d.494), another Mālikite commentator on the Muwatta', justifies this by maintaining:

*'The position of the imām is respected, and therefore it should be given priority and should be regarded as one of the most important matters in religion. Thus, the imām of the prayers is similar to leaders of the Islamic community ('umarā' and khulafā') which require that such a person must not have a deficiency in qualities (naqṣ)'.*⁷⁷

Thus, according to the Mālikites:

*'It is reprehensible (makrūh) to appoint the walad zinā as an imām because he was created from wicked sperm (nutfah khabīthah)'.*⁷⁸

The Ḥanafīs also maintain:

*'The walad zinā serving as an imām is reprehensible (makrūh) and that the ma'mūm who follows him will not get a reward from Allāh'.*⁷⁹

⁷⁶Al-Zurqānī, Sharḥ al-Zurqānī, vol. I, p. 276

⁷⁷Al-Zurqānī, Sharḥ al-Zurqānī, vol. I, p. 276

⁷⁸Al-Zurqānī, Sharḥ Muwatta', vol. I, p. 276

⁷⁹Ibn Qudāmah, al-Mughnī, vol. II, p. 59, al-Maqdisī, al-Sharḥ al-Kabīr, printed in the margin of Ibn Qudāmah, al-Mughnī, vol. II, p. 58, Al-Jazirī, al-Fiqh 'alā al-Madhāhib al-Arba'ah, vol. I, p. 430, al-Sarakhsī, al-Mabsūṭ, vol. I, p. 41.

According to al-Shāfi'ī:

'The prohibition is only reprehensible (makrūh) because the imām is regarded as in a respected position (mawḍi' faḍl) and rewards are not only for the imām himself but also for those who pray behind him. However, the makrūh nature of the walad zinā leading the prayer does not require those who have performed the prayer behind him to repeat it'.⁸⁰

In contrast to the view held by those three schools of law, the Ḥanbalīs maintain that the ḥukm of the walad zinā serving as an imām of prayer (whether rawātib or nawāfil) is not reprehensible so long he is sound in religion (salima dīnahu). The status of the walad zinā according to the Ḥanbalīs is similar to a slave. It is not reprehensible for a slave to become an imām of the prayers even though the ḥurr has a priority to be an imām over the slave.⁸¹ The Ḥanbalīs justify their position through a ḥadīth of the Prophet Muḥammad:

'A person is allowed to lead (ya'umm) the people in prayer so long as he is (one of) the best in recitation of the Holy Qur'an (aqra'uhum). In the case of two men whose qualities are similar, the one who is knowledgeable in the traditions should be given priority. However, if the knowledge of the traditions is similar, then choose the one who had first participated in the migration to Medina (hijrah). If they still have similar

⁸⁰ Al-Shāfi'ī, *al-Umm*, vol. I, p. 193, Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59, al-Maqdisī, *al-Sharḥ al-Kabīr*, printed in the margin of Ibn Qudāmah, *al-Mughnī*, vol. II, p. 58, al-Jazirī, *al-Fiqh 'alā al-Madhāhib al-Arba'ah*, vol. I, p. 430.

⁸¹ Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59, al-Maqdisī, *al-Sharḥ al-Kabīr*, printed in the margin of Ibn Qudāmah, *al-Mughnī*, vol. II, p. 58. Thus, according to the Ḥanbalites, a slave is not qualified to give testimony (shahādah) in marriage and property but not the walad zinā.

qualities, priority should be given to the one who preceded in embracing the Islamic religion. A man would not be allowed to lead the prayers who was under another's authority (*sulṭān*)...⁸².

This is because the *walad zinā* has nothing to do with a crime committed by its parents as al-Qur'ān says that, '... no bearer of a burden can bear the burden of another...[al-An'ām (6):164] and '... the noblest of you, in the sight of Allāh, is the best in conduct...'[al-Hujurāt:13].⁸³

2. Giving Testimony - 'Umar b. 'Abd al-'Azīz and Nāfi' are reported to have rejected the testimony of the *walad zinā*.⁸⁴ However, Sa'īd al-Anṣārī, Layth b. Sa'd and Mālik only rejected testimony in the case of those who had committed *zinā*.⁸⁵ Al-Sha'bi,⁸⁶ and 'Aṭā' b. Abī Rabāḥ,⁸⁷ the Ḥanafīs and the Ḥanbalīs

⁸²Ibn Rushd, *Bidāyat al-Mujtahid*, vol. I, p. 104, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, translated by Imran Ahsan, vol. I, p. 159, al-Sarakhsī, *al-Mabsūṭ*, vol. I, p. 41, Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59, al-Maqdisī, *al-Sharḥ al-Kabīr*, printed in the margin of Ibn Qudāmah, *al-Mughnī*, vol. II, p. 58, al-Ṣan'ānī, *al-Muṣannaf*, vol VII, p. 455, al-Sarakhsī, *al-Mabsūṭ*, vol. I, p. 41, al-Zurqānī, *Sharḥ al-Zurqānī*, vol. I, p. 276, cf; al-Shaybānī, *Kitāb al-Āthār*, p. 56.

⁸³Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59, al-Maqdisī, *al-Sharḥ al-Kabīr*, printed in the margin of Ibn Qudāmah, *al-Mughnī*, vol. II, p. 58, al-Ṣan'ānī, *al-Muṣannaf*, vol VII, p. 455.

⁸⁴Al-Ṣan'ānī, *al-Muṣannaf*, vol. VII, p. 457, Etan Kohlberg, 'The Position of *walad zinā* in Imamism Shi'ism', pp. 256-258..

⁸⁵Al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 211, Aḥmad al-Dardīr, *Aqrab al-Masālik*, p. 174.

⁸⁶Al-Bayhaqī, *al-Sunan al-Kubrā*, vol. III, pp. 91, al-Ṣan'ānī, *al-Muṣannaf*, vol. II, p. 397.

⁸⁷Al-Bayhaqī, *al-Sunan al-Kubrā*, vol. III, p. 91.

admitted it without qualification.⁸⁸ Al-Shāfi'ī emphasizes specifically that such testimony is valid in cases involving zinā.⁸⁹ In other words, provided the walad zinā was a just man, the circumstances of his birth had nothing to do with the acceptability of his evidence. Thus, despite early objections to the testimony of the walad zinā, the jurists have taken a more positive attitude to this than they did toward the walad zinā leading the prayer.

3. Slavery and Manumission - This involves the problem of whether the owner of a slave woman may manumit her illegitimate child. The early legal scholars and Traditionists including 'Umar b. al-Khaṭṭāb and his son 'Abd Allāh, 'Ā'ishah, Ibn 'Abbās, Ḥasan al-Baṣrī, al-Sha'bi, Ibn Jurayj and 'Aṭā' b. Abī Rabāḥ have not only allowed someone to manumit and maintain the walad zinā but also to manumit its mother.⁹⁰ The Ḥanafī al-Sarakhsī quoted the ḥadīth reported by 'Abd Allāh b. 'Umar that a slave woman is reported to have committed zinā and

⁸⁸ Al-Bayhaqī, *al-Sunan al-Kubrā*, vol. III, pp. 91, al-Ṣan'ānī, *al-Muṣannaf*, vol. II, p. 396, Ibn Qudāmah, *al-Mughnī*, vol. II, p. 59, al-Maqdisī, *al-Sharḥ al-Kabīr*, printed in the margin of Ibn Qudāmah, *al-Mughnī*, vol. II, p. 58, Charles Hamilton, *The Hedaya*, vol. II, p. 363, cf. Etan Kohlberg, 'The Position of walad zinā in Imamism Shi'ism', pp. 256-258.

⁸⁹ Al-Shāfi'ī, *al-Umm*, vol. VI, p. 226, cf. Etan Kohlberg, 'The Position of walad zinā in Imamism Shi'ism', pp. 257.

⁹⁰ Al-Ṣan'ānī, *al-Muṣannaf*, vol. VII, p. 456. See also ḥadīth nos. 13869, 13870, 13872, 13873, 13874, cf. al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, p. 59, cf. al-Zurqānī, *Sharḥ al-Zurqānī*, vol. p. 86 and 89, al-Burhānpūrī, *Kanz al-Ummāl*, vol. V, p. 259. According to al-Sarakhsī, the ḥadīth which allows manumission of the illegitimate child is because the child's mother was a slave. This is what made Ibn 'Umar manumit that woman and her child. This is a proof that manumission is allowed for the way of taqarrub to God. [al-Sarakhsī, *al-Mabsūṭ*, vol. VII, p. 77.]

given birth to a child. Ibn ʿUmar manumitted the mother and her (illegitimate) child. According to al-Sarakhsī, this is the proof that one of the ways to get closer to Allāh (*taqarrub*) is by manumitting the walad zinā. It is reported also that Ibn ʿUmar told the people to treat the walad zinā well and encourage them to manumit the walad zinā because the walad zinā should also be dignified like any other person who has dignity because he/she is innocent, the sinful act was committed by his/her parents.⁹¹ In *Sunan al-Kubrā*,⁹² it is reported that Abū Hurayrah had been asked about whether walad zinā would be allowed to be manumitted. Abū Hurayrah reported in the affirmative. When Ibn ʿAbbās was asked by someone about whether to manumit of a slave who was a walad zinā or a legitimate slave (walad rushdah), presumably as an act of atonement (*kaffārah*), he advised that person to see which one of the two would bring the higher price. The person found the price of the walad zinā was higher by one dirham than the other slave. Then Ibn ʿAbbās told him to manumit the illegitimate slave. It is narrated by Sufyān from Yūnus from al-Ḥasan that the manumission of walad zinā was the same as the manumission of any other slave.

Abū Ḥasan, the mawlā of ʿAbd Allāh b. al-Ḥārith who has been regarded as one of the old (generation) of the mawlā of Quraysh tribe and most

⁹¹ Al-Sarakhsī, *al-Mabsūt*, vol. VII, p. 77.

⁹² Al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, p. 59.

knowledgeable (*ahl al-ʿilm minhum wa al-ṣalāh*) is reported to have heard that a slave woman who has been manumitted by her patron requested a legal opinion from ʿAbd Allāh b. Nawfal about whether her illegitimate child would also be manumitted because of her manumission. ʿAbd Allāh b. Nawfal is reported to have said:

*‘I heard ʿUmar b. al-Khaṭṭāb say that he would prefer to go to the holy war (jihād) wearing a pair of sandals (ʿalā naʿlayn) rather than manumit a walad zinā’.*⁹³

ʿĀishah, Abū Hurayrah and Mujāhid disallow buying and selling an illegitimate slaves and also their manumission.⁹⁴ A similar view is reported on the authority of Suhayl b. Abī Ṣāliḥ. He also mentioned that Abū Hurayrah said:

*‘To participate in the path of Allāh (li ʿan umtiʿa fī sabīl li Allāh) is dearer to me than manumitting a walad zinā’.*⁹⁵

⁹³ Al-Ṣanʿānī, *al-Muṣannaf*, vol VII, p. 455, al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, p.59.

⁹⁴ Al-Ṣanʿānī, *al-Muṣannaf*, vol. VII, p. 456.

⁹⁵ Al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, p. 59.

4. Ṣalāt al-Janāzah of the walad zinā.

All Muslim jurists hold that in the case of the walad zinā dies, the funeral prayers should be led by the mother's walī, who is, in effect, the walī of the child.

In general, most Muslim jurists agree that the dead walad zinā should not be treated differently from any other Muslims.⁹⁶ As far as the moral position relating to walad zinā is concerned, it is reported that 'Aṭā' b. Abī Rabāh has no objection to visit the walad zinā if he/she is sick.⁹⁷ 'Umar, Ibn Jurayj and 'Amr b. Dīnār maintained that the illegitimate child should be commended to be well behaved and treated well.⁹⁸

⁹⁶ Al-Burhānpūrī, *Kanz al-'Ummāl*, vol. V, p. 259, Etan Kohlberg, 'The Position of walad zinā in Imamism Shi'ism', p. 257, al-Bayhaqī, *al-Sunan al-Kubrā*, vol. III, pp. 91, Qādī Abū Yūsuf, *Kitāb al-Āthār*, p. 56, In this connection, it is reported that when 'Aṭā' b. Abī Rabāh was asked whether the illegitimate child be allowed to be an *imām* of the prayers, he is reported to have replied in the affirmative so long as he regularly performs prayers and fasting. Abū Hurayrah holds a different view particularly if the illegitimate child dies, he is reported not to have participated the funeral prayers of the illegitimate child (*lam yuṣalli 'alayh*). [al-Ṣan'ānī, *al-Muṣannaf*, vol VII, p. 455, al-Burhānpūrī, *Kanz al-'Ummāl*, vol. V, p. 259.]

⁹⁷ Al-Bayhaqī, *al-Sunan al-Kubrā*, vol. III, pp. 90-91.

⁹⁸ Al-Ṣan'ānī, *al-Muṣannaf*, vol. VII, p. 456. See also *ḥadīth* nos. 13871, 13875, 13881, and 13882, al-Burhānpūrī, *Kanz al-'Ummāl*, vol. V, p. 259.

III. CONCLUSION

In this chapter, the comprehensive regulations regarding illegitimacy has been demonstrated. The evidence shows that the Prophet Muḥammad laid the basic foundations for this. However, the details of these rules were developed by later jurists. When the illegitimacy of the child is established beyond contradiction, whether as a result of zinā or liʿān, the child derives its nasab from the mother. It is her family, who are theoretically required by law to provide for the child and her walī will be the child's walī in terms of diyāh and marriage if the child is a girl. There will be reciprocity between the child and the mother's family in terms of inheritance. In other words, Islamic law is attempting to lay down a legal and moral basis for provision for the walad zinā.

CHAPTER THREE

TREATMENT OF FOUNDLING (AL-LAQĪT)

I. Introduction

In Chapter one we dealt with the importance of legitimate *nasab* for a child and the modes of establishing it. Chapter two dealt with the child known to be illegitimate and the legal consequences of this. In this chapter, we will try to deal with the problems which arise for the foundling (*laqīṭ*). The terms *laqīṭ* and *manbūdh* are used for a child who has been abandoned by its mother or its parents and has been found by others. This is an area of Islamic law in which there are very few Traditions. Reference will be made to those which have been found in the course of the discussion. However, most of the views given by the jurists seem to be based on *ijtihād*.

II. Reasons for the Abandonment of the Child

The reasons for the abandonment of a child seem to fall into several categories. The first and most blameworthy on the part of the parents who abandon the child is a simple lack of concern for, and interest in, the child and a desire to be without it, without going as far as deliberately killing it. The second

arises out of the poverty of the parents who feel unable to provide for the child and hope that the finder of the child may provide for it in a better way than they can. The third is a child born as a result of zinā. It would normally be the mother who left the child abandoned. Her reasons for doing this would be, in the case of a married woman, to avoid a divorce through li'ān which would declare the child to be illegitimate and bring shame on her family. The ṭhayyib, divorcee or widow, who became pregnant as a result of adultery, might also abandon the child in order to escape the punishment of stoning since she is regarded as muḥṣan and is therefore liable to that penalty. The other woman who might abandon a child would be an unmarried mother, who became pregnant by fornication, and wished to avoid the ḥadd penalty of flogging and also of avoiding the child being known as illegitimate, thereby bringing shame on herself and her family.¹ Thus al-Tahanāwi says:

*'Laqī' as a child of an unknown genealogy (majhūl al-nasab) who is abandoned on the street or other place from fear of destitution or fear that the woman who gives birth is accused of adultery or fornication (zinā)'.*²

¹Charles Hamilton, *The Hedaya*, vol. II, p. 206, cf; Thomas Patrick Hughes, *Dictionary of Islam*, p. 131, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. III, p. 80, cf; Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 326, cf; Abū Bakr al-Kashnāwī, *Ashal al-Madārik*, vol. III, p. 79, cf; *Lā'ihāt Majallat al-Aḥkām al-Shar'iyyah*, p.211, cf; 'Abd al-Karīm Zaydān, *Majmū'ah Buḥūth Fiqhiyyah*, p. 352, al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. V, p. 764, cf; al-Ramlī, *Nihāyat al-Muḥtāj*, vol. V, p. 446, cf; al-Khaṭīb, *al-Iqnā'*, p. 41, cf; al-Shirbīnī al-Khaṭīb, *Mughnī al-Muḥtāj*, vol. II, p. 387, cf; 'Abd al-Ḥamīd al-Sharwānī and Aḥmad b. Qāsim al-'Abbādī, *Ḥawāshī Tuḥfat al-Muḥtāj bi-Sharḥ al-Minhāj*, vol.IV, pp.341-342. According to al-Ramlī, a foundling refers to child discarded on a street where the claimant of the child is not known or da'ī. [See al-Ramlī, *Nihāyat al-Muḥtāj*, vol. V, p.446].

²Muḥammad 'Alī al-Tahānawī, *A Dictionary of the Technical Terms*, p. 1296.

Similarly, the Ḥanafīs make this clear in their definition. The foundling is a living child who has been abandoned by its parents out fear of destitution or the accusation of adultery or fornication.³ The Mālikī jurist Ibn ʿAbd al-Barr goes as far as to suggest that the child of unknown *nasab* was tantamount to being *walad zinā*.⁴ This uncertainty of the child's *nasab* leads to some legal problems.

The *Majallah* says:

'A child who has been abandoned in fear of disgrace or poverty is worthy of the sympathy of his fellow beings'.⁵

All Muslim jurists regard the act of abandoning a child for whatever reason as sinful.⁶ The Ḥanafīs go as far as demanding that the authorities (*sultān*) should apply discretionary punishment (*taʿzīr*) on those who abandon children if they are apprehended.⁷ In any case they maintain that punishment from God is due to them in the Hereafter.⁸

³Charles Hamilton, *The Hedaya*, vol. II, p. 206, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 209; cf; al-Ḥaṣḥafī, *Sharḥ al-Durr al-Mukhtār*, vol. I, p. 490, cf; al-Zaylāʿī, *Tabyīn al-Ḥaqqāʾiq*, vol. III, p. 297, cf; M. Zayd al-Abyānī, *Sharḥ al-Aḥkām al-Sharʿiyyah*, vol. I, p. 35, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, p. 427, cf; *Lāʾiḥat Majallat al-Aḥkām al-Sharʿiyyah*, p. 211, cf; Muḥammad ʿAlī al-Tahānawī, *A Dictionary of the Technical Terms*, p. 1296, cf; ʿAbd al-Karīm Zaydān, *Majmūʿah Buḥūth Fiqhiyyah*, p. 352.

⁴Al-Zurqānī, *Sharḥ al-Zurqānī*, vol. I, p. 276.

⁵The *Majallah*, part V, article 356.

⁶Ibn Qudāmah, *al-Mughnī*, vol. V, p. 679, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 209.

⁷Al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 209.

⁸Ibn Qudāmah, *al-Mughnī*, vol. V, p. 679, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 209.

III. The Rule (*ḥukm*) Governing the Finding of an Abandoned Child

There are some differences among the Muslim jurists on the rules governing the finding of an abandoned child. In principle, according to the Ḥanafīs, the rule (*ḥukm*) of taking up an abandoned child is recommended (*mandūb*).⁹ But, if the child is exposed to danger, according to the Ḥanafites, it is incumbent (*wājib kifāyah*) on the Muslim generally,¹⁰ i.e. as long as one Muslim carries this out, the other Muslims are exempt from doing it.

The other three schools of law, however, reject the view that the taking up of the abandoned child is only recommended and regard it as *wājib kifāyah*.¹¹

⁹Charles Hamilton, *The Hedaya*, vol. II, p. 206, cf; al-Zayla'ī, *Tabyīn al-Ḥaqā'iq*, vol. III, p. 297, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 209, cf; al-Mirghinānī, *al-Hidāyah*, vol. II, p. 173, al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. V, p. 764, cf; al-Ḥaṣkafī, *Sharḥ al-Durr al-Mukhtār*, vol. I, p. 490, cf; al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. VI, p. 198, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, p. 427, cf; Thomas Patrick Hughes, *Dictionary of Islam*, p. 131, see also 'Umar Farrūkh, *The Family in Moslem Jurisprudence*, p. 102, cf; al-Dāghistānī, *al-Laḳīṭ fi al-Islām*, p. 21.

¹⁰See al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. V, p. 764, M. Zayd al-Abyānī, *Sharḥ al-Aḥkām al-Shar'īyyah*, vol. I, p. 36, cf; Charles Hamilton, *The Hedaya*, vol. II, p. 206, cf; al-Zayla'ī, *Tabyīn al-Ḥaqā'iq*, vol. III, p. 297, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 209, cf; al-Mirghinānī, *al-Hidāyah*, vol. II, p. 173, al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. V, p. 764, cf; al-Ḥaṣkafī, *Sharḥ al-Durr al-Mukhtār*, vol. I, p. 490, cf; al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. VI, p. 198, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, p. 427, cf; Thomas Patrick Hughes, *Dictionary of Islam*, p. 131, see also 'Umar Farrūkh, *The Family in Moslem Jurisprudence*, p. 102, *Lā'ihāt Majallat al-Aḥkām al-Shar'īyyah*, p. 211, cf; Ibn Qudāmah, *al-Mughnī*, *op.cit.*, vol. V, p. 683, cf; al-Dāghistānī, *al-Laḳīṭ fi al-Islām*, p. 21.

¹¹Al-Shīrāzī, *al-Muḥadhdhab*, vol. I, p. 434, al-Ramlī, *Nihāyat al-Muḥtāj*, vol. V, p. 447, al-Shirbīnī al-Khaṭīb, *Mughnī al-Muḥtāj*, vol. II, p. 387, al-Dimashqī, *Kifāyat al-Akhyār*, p. 319, cf; 'Abd al-Ḥamīd al-Sharwānī and Aḥmad b. Qāsim al-'Abbādī, *Ḥawāshī Tuḥfat al-Muḥtāj bi-Sharḥ al-Minhāj*, vol. IV, p. 342, al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 59, cf; Abū Shujā', *Taqrīb* (translated by A.A.Qadri), *A Sunni Shafi'i Law Code*, p. 83, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 232, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. III, p. 80, cf; Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 326, cf; al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, p. 243, Abū Bakr al-Kashnāwī, *Ashal al-Madārik*, vol. III, p. 79, cf; Ibn Qudāmah, *al-Mughnī*, *op.cit.*, vol. V, p. 683 cf; al-Bahūtī, *Kashshāf al-Qinā'*, vol. IV, p. 226, cf; al-Dāghistānī, *al-Laḳīṭ fi al-Islām*, p. 21.

However, if the child is exposed to danger, then the other three schools in contrast to the Ḥanafīs do not make this wājib kifāyah but wājib ʿayn, that is, it is the individual duty of anyone who finds an abandoned child in a place where it is exposed to danger to take it.¹² The Mālikīs, however, are reported to have declared that there are certain conditions that have to be taken into consideration in order to determine whether taking up a foundling becomes wājib kifāyah. The two conditions which have been stipulated by the Mālikites are [a] when all members of the community are presumably able to take up such a foundling; and [b] when the public road or street was the place where the abandoned child was abandoned, i.e., access is available to the people (*maṭrūq li al-nās*).¹³ The Ḥanbalīs justify the duty to take up an abandoned child who is exposed to danger by maintaining that it would be similar to feeding a child when it is hungry or rescuing someone from drowning, i.e. it is wājib.¹⁴ In addition, according to the Mālikīs, if the foundling was abandoned in a remote area,¹⁵ or according to the Shāfiʿīs, where there is only one individual finder,¹⁶

¹²Al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 59, al-Dimashqī, *Kifāyat al-Akhyār*, p. 319, cf; Ibn Qudāmah, *al-Mughnī*, *op cit.*, vol. V, p. 679, al-Shīrāzī, *al-Muḥadḍhab*, vol. I, p. 434, al-Ramlī, *Nihāyat al-Muḥtāj*, vol. V, p. 447, al-Shirbīnī al-Khaṭīb, *Mughnī al-Muḥtāj*, vol. II, p. 387, cf; ʿAbd al-Ḥamīd al-Sharwānī and Ahmad b. Qāsim al-ʿAbbādī, *Ḥawāshī Tuḥfat al-Muḥtāj bi-Sharḥ al-Minhāj*, vol. IV, p. 342, cf; Abū Shujāʿ, *Taqrīb* (translated by A.A.Qadri), *A Sunni Shafiʿī Law Code*, p. 83, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 232, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. III, p. 80, cf; Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 326, cf; al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, p. 243, Abū Bakr al-Kashnāwī, *Ashāl al-Madārik*, vol. III, p. 79, cf; Ibn Qudāmah, *al-Mughnī*, *op.cit.*, vol. V, p. 683, cf; al-Bahūtī, *Kashshāf al-Qināʿ*, vol. IV, p. 226, cf; al-Dāghistānī, *al-Laḳīṭ fī al-Islām*, p. 21.

¹³Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 326.

¹⁴Ibn Qudāmah, *al-Mughnī*, *op cit.*, vol. V, p. 679, cf; al-Bahūtī, *Kashshāf al-Qināʿ*, vol. IV, p. 226.

¹⁵Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 326.

the rule (*ḥukm*) of taking up the abandoned child is *wājib ʿayn* for the individual who finds it.¹⁷

According to all jurists, after having found a foundling and taken it, it would be forbidden (*ḥarām*) to replace it and it would be regarded as a failure of duty by the finder.¹⁸ They regard replacing the foundling in the place where it was found as a failure to fulfil one's duty (*lā-yajūz*).¹⁹ The *Majallah* provides:

'... He who finds an abandoned child must take it up and furnish it with the necessary aid. He will be lacking in the fulfilment of his duty, if he finds a child in danger and does not take it up, or abandons it after having taken it up.'²⁰

Despite the Mālikī view that it is not permissible to return the abandoned child to the place where it was found, they do, or at least some of them do, allow the abandoned child to be returned to the place where the finder found it if his intention had been to take it to the authorities (*ḥākim*) and they had refused to

¹⁶Al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 59.

¹⁷Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 326, cf; al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 59, cf; Ibn Qudāmah, *al-Mughnī*, vol. V, p.679, al-Bahūtī, *Kashshāf al-Qināʿ*, vol. IV, p. 227.

¹⁸See *Lā'ihat Majallat al-Aḥkām al-Sharʿiyyah*, *op.cit.*, p. 212, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, p. 427, cf; Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 328, cf; Nawab A.F.M. Abdur Rahman, *Institutes of Mussalman Laws*, p. 193, Charles Hamilton, *The Hedayah*, vol. II, bk. 10, p.206, cf; ʿUmar Farrūkh, *The Family in Moslem Jurisprudence*, p. 102.

¹⁹See *Lā'ihat Majallat al-Aḥkām al-Sharʿiyyah*, *op.cit.*, p. 212.

²⁰*The Majallah*, part V, article. 356.

accept the child, presumably not believing that the foundling was genuinely abandoned and that it was the child of the finder. The other reason for which these jurists allow the finder to return the foundling is where the finder only intended to look for the child's family.²¹ However, they stress that the place to which the abandoned child is returned should be easily accessible (*maṭrūq li-al-nās*) so that another person might find the child. They are not allowed to put it in a remote place.²² It should be emphasised that none of the other schools of law allow this to happen for any reason.²³ The rules governing finding and taking up an abandoned child are very different from those concerned with an object which has been either lost or abandoned and is then found by someone else. The *luqatah* being a material object involves different rules from those governing the *laqīṭ* who is a living person. As far as lost property is concerned, the finder must try to find the owner but if he fails he becomes entitled to the property after a year.²⁴ There is no injunction to take up the lost property. On the other hand, we have seen that, for the Mālikīs, the Shāfi'īs and the Ḥambalīs, it is *wājib* to

²¹ *Lā'ihat Majallat al-Aḥkām al-Shar'īyyah*, p. 212; cf. Aḥmad al-Ṣāwī, *Bulghat al-Salik*, vol. II, p. 328, cf.; 'Abd al-Karīm Zaydān, *Majmū'ah Buḥūth Fiqhiyyah*, p. 357.

²² See *Lā'ihat Majallat al-Aḥkām al-Shar'īyyah*, p. 212; cf. Aḥmad al-Ṣāwī, *Bulghat al-Salik*, vol. II, p. 328, cf.; 'Abd al-Karīm Zaydān, *Majmū'ah Buḥūth Fiqhiyyah*, p. 357.

²³ *Lā'ihat Majallat al-Aḥkām al-Shar'īyyah*, *op.cit.*, p. 212, cf. Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhṣiyyah*, p. 427, cf. Nawab A.F.M. Abdur Rahman, *Institutes of Mussalman Laws*, p. 193, Ibn 'Abdīn, *Radd al-Muḥtār*, vol. III pp. 341-342, Charles Hamilton, *The Hedayah*, vol. II, bk. 10, p.206, al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 59, cf. Ibn Qudāmah, *al-Mughnī*, vol. V, p.679, al-Bahūtī, *Kashshāf al-Qinā'*, vol. IV, p. 227, 'Umar Farrūkh, *The Family in Moslem Jurisprudence*, p. 102.

²⁴ See for example, Mālik b. Anas, *Kitāb al-Muwatta'*, p. 647, al-Shaybānī, *Kitāb al-Āthār*, p. 197, Qādī Abū Yūsuf, *Kitāb al-Āthār*, p. 167-168, al-Ṭahāwī, *Mukhtaṣar al-Ṭahāwī*, p. 139, al-Dārimī, *Sunan al-Dārimī*, vol. II, p. 265, al-Shāfi'ī, *al-Umm*, vol. IV, pp.73-74.

pick up the child and *mandūb* for the Ḥanafīs. The jurists, by not saying how much time the finder may leave the abandoned child where he found him, seem to imply that this action should be carried out swiftly. The reason for this probably involves the avoidance of danger to the child. Also as we have already noted earlier, the abandoned child can always be reclaimed from childhood to adulthood by *istilhāq*.²⁵ Thus, the jurists are anxious to establish a legitimate *nasab* for the child and give wide scope for a claimant to make his claim. The difference in legal theory of taking up the child being either recommended or necessary or *wājib kifāyah* seem to be the result of the jurists own *ijtihād* as there does not seem to be any traditions from *ḥadīth* or any statements in the Qur'ān about this.

IV. Legal Assumption of Freedom of the Abandoned Child

The abandoned child seems generally to be regarded as legitimate, although it is possible that the abandoned child is the offspring of a slave, the vast majority of Muslim jurists maintain that, in the absence of any decisive evidence to the contrary, the abandoned child should be regarded as free (*ḥurr*).²⁶ The *ḥadīth* says: 'A foundling is considered free (*ḥurr*)'.²⁷ This is

²⁵Cf; chapter 4, pp.133-139.

²⁶Al-Shāfi'i, *al-Umm*, vol. IV, pp. 73-74, cf; Saḥnūn, *al-Mudawwanat al-Kubrā*, vol. VI, p.222, *Mukhtaṣar al-Muzanī*, vol. IX, p. 237, cf; al-Shīrāzī, *al-Muḥadhdhab*, vol. I, p. 434, cf; *Ḥāshiyat Qalyūbī*, vol. III, p. 128, *Ḥāshiyat 'Umayrah*, vol. III, p. 128, al-Ramlī, *Nihāyat al-Muḥtāj*, vol. V, p. 448, Ibn Qudāmah, *al-Mughnī*, vol. VIII, p. 316, cf; al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol II, p. 61, cf; al-Shirbīnī al-Khaṭīb, *Mughnī al-Muḥtāj*, vol. II, pp. 390-391, cf; *Ḥāshiyat al-Shaykh Sulaymān al-Jamal*, vol. III, pp. 615-616,

reinforced by the Tradition of Abū Jamīlah and Caliph ʿUmar where the latter declares that the abandoned child is free.²⁸ However, al-Nakhaʿi (d. 96AH) held that if the finder took the child to the office of *hisbah*, he would be free but if he wanted to enslave him, that would be his right. Al-Nakhaʿi's view is contradicted by the majority of the Muslim scholars who declare that man was born free (*hurr*),²⁹ as Almighty God has created the Prophet Adam and his descendants.³⁰ Many Muslim jurists preferred that the foundling's being taken up should be witnessed in order to prevent the finder from enslaving him (*istirqāq*).³¹

see also Abū Zakariyyā al-Anṣārī, *Sharḥ al-Minhāj*, printed in the margin of *Hāshiyat al-Shaykh Sulaymān al-Jamal*, vol. III, pp. 615-616, cf; al-Dimashqī, *Kifāyat al-Akhyār*, p. 321, cf; al-Bijirmī, *Bijirmī ʿalā al-Khaṭīb*, vol. III, p. 288, cf; al-Maqdisī, *al-ʿUddah Sharḥ al-ʿUmdah*, p. 262, al-Mardāwī, *al-Inṣāf*, vol. VI, p. 432, Ibn al-Najjār, *Muntahā al-irādāt*, vol. I, p. 559, Ibn Qudāmah, *al-Mughnī*, vol. IV, p. 680, al-Bahūtī, *Kashshāf al-Qināʿ*, vol. IV, p. 226, cf; Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 279, cf; al-Mirghīnānī, *al-Hidāyah*, vol. II, p. 174, Charles Hamilton, *The Hedaya*, vol. II, p. 206, cf; al-Zaylaʿī, *Tabyīn al-Ḥaqāʾiq*, vol. III, p. 297, cf; M. Zayd al-Abyānī, *Sharḥ al-Aḥkām al-Sharʿiyyah*, vol. I, p. 36, al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 209, cf; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, vol. VI, p. 197, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 232, cf; al-Ṭahāwī, *Mukhtaṣar al-Ṭahāwī*, p. 141, al-Ḥaṣkafī, *Sharḥ al-Durr al-Mukhtār*, vol. I, p. 490, cf; Saḥnūn, *al-Mudawwanat al-Kubrā*, vol. III, p. 222, al-Dusūqī, *Hāshiyat al-Dusūqī*, vol. IV, p. 125, Abū Bakr al-Kashnāwī, *Aṣḥal al-Madārik*, vol. III, p. 79, al-Zuhaylī, *al-Fiqh al-Islamī*, vol. V, 766, Subḥī Maḥmaṣṣānī, *Turāth al-Khulafāʾ*, p. 234, al-Ṣanʿānī, *al-Muṣannaf*, vol. IX, p. 14-15.

²⁷ Ibn Hajar al-ʿAsqalānī, *Fath al-Bārī*, vol. XII, p. 40, al-Burhānpūrī, *Kanz al-ʿUmmāl*, vol. XV, pp. 200-201, al-Ṣanʿānī, *al-Muṣannaf*, vol. IX, p. 14-15.

²⁸ See footnote 26.

²⁹ Al-Shīrāzī, *al-Muḥadhdhab*, vol. I, p. 434, cf; *Mukhtaṣar al-Muzanī*, vol. IX, p. 237, cf; al-Maqdisī, *al-ʿUddah Sharḥ al-ʿUmdah*, p. 262, Ibn Qudāmah, *al-Mughnī*, vol. IV, p. 680, al-Bahūtī, *Kashshāf al-Qināʿ*, vol. IV, p. 226, cf; Charles Hamilton, *The Hedaya*, vol. II, p. 206, cf; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, vol. VI, p. 197, M. Zayd al-Abyānī, *Sharḥ al-Aḥkām al-Sharʿiyyah*, vol. I, p. 36, cf; al-Mirghīnānī, *al-Hidāyah*, vol. II, p. 173, cf; al-Dusūqī, *Hāshiyat al-Dusūqī*, vol. IV, p. 125, al-Zuhaylī, *al-Fiqh al-Islamī*, vol. V, 766.

³⁰ Ibn Qudāmah, *al-Mughnī*, vol. IV, p. 680, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 209.

³¹ Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 232, cf; al-Bahūtī, *Kashshāf al-Qināʿ*, vol. IV, p. 226, cf; al-Dusūqī, *Hāshiyat al-Dusūqī*, vol. IV, p. 126, cf; al-Bijirmī, *Bijirmī ʿalā al-Khaṭīb*, vol. III, p. 286, al-Shīrāzī, *al-Muḥadhdhab*, vol. I, p. 435, al-Ramlī, *Nihāyat al-Muḥtāj*, vol. V, p. 447, al-Shirbīnī al-Khaṭīb, *Mughnī al-Muḥtāj*, vol. II, p. 418, al-Dimashqī, *Kifāyat al-Akhyār*, p. 320, Ibn Hajar al-

V. The Religious Status of the Abandoned Child

As far as the religious status (*diyānah*) of the foundling is concerned, it seems that most scholars of Muslim family law agree that the foundling should be considered as a Muslim if he or she has been found in a Muslim quarter.³² However, Mālik is quoted as saying that a foundling is considered a Muslim if its father is a Muslim (sic!),³³ or if the finder is a Muslim.³⁴ According to the Ḥanafīs, the Mālikīs and the Ḥambalīs, the foundling is presumed to be from the people of the book (*dhimmī*) when found in a quarter inhabited by Jews or Christians.³⁵ The Shāfi'īs and the Ḥambalīs are reported to have held two views

Haythamī, *Tuhfat al-Muhtaj* printed in the margin of 'Abd al-Ḥamīd al-Sharwānī and Aḥmad b. Qāsim al-'Abbādī, *Ḥawāshī Tuhfat al-Muhtaj bi-Sharḥ al-Minhāj*, vol. VI, p. 342, Ibn Qudāmah, *al-Mughnī*, vol. V, p. 756, cf; al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 60.

³²Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 232, al-Dusūqī, *Ḥāshiyat al-Dusūqī*, vol. IV, p. 126, Joseph Schacht, *An Introduction to Islamic Law*, p. 166, cf; Nawab A.F.M Abdur Rahman, *Institutes of Mussalman Law*, p. 193, Ibn 'Abdīn, *Radd al-Muhtār*, vol.III, pp.342-345, Charles Hamilton, *The Hedaya*, vol II, bk. 10 pp. 207, al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. VII, p. 198, Qalyūbī wa 'Umayrah, vol. III, p. 126, cf; al-Ḥaṣkafī, *Sharḥ al-Durr al-Mukhtār*, vol.I, p. 490, cf; Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakhsīyyah*, p. 427, cf; al-Shirāzī, *al-Muḥadhdhab*, vol. I, p. 434, al-Ramlī, *Nihāyat al-Muhtāj*, vol. V, p. 448, cf; Ibn Qudāmah, *al-Mughnī*, vol. V, 748, al-Bahūtī, *Kashshāf al-Qinā'*, vol. IV, p. 234, Ibn al-Najjār, *Muntahā al-Irādāt*, vol. I, p. 559, al-Maqdisī, *al-'Uddah Sharḥ al-'Umdah*, p. 262, al-Mardāwī, *al-Insāf*, vol. VI, p. 433-435, Charles Hamilton (tran.) *The Hedaya*, vol II, bk. 10 pp. 207, cf; Ṣāliḥ 'Abd al-Samī' al-Azhari, *al-Tāj wa al-Iklīl*, vol. VI, p. 82, Ibn al-Najjār, *Muntahā al-Irādāt*, vol. I, p. 559, cf; Abū Bakr al-Kashnāwī, *Ashal al-Madārik*, vol. III, p. 81, al-Shirāzī, *al-Muḥadhdhab*, vol. I, p. 435, Charles Hamilton (tran.) *The Hedaya*, vol II, bk. 10 pp. 207, *Ḥāshiyat Qalyūbī*, vol. III, p. 126, *Ḥāshiyat 'Umayrah*, vol. III, p. 126, cf; al-Ramlī, *Nihāyat al-Muhtāj*, vol. V, p. 448, cf; Ibn Qudāmah, *al-Mughnī*, vol. V, 748.

³³Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 232.

³⁴Al-Dusūqī, *Ḥāshiyat al-Dusūqī*, vol. IV, p. 126.

³⁵Nawab A.F.M Abdur Rahman, *Institutes of Mussalman Law*, p. 193, Ibn 'Abdīn, *Radd al-Muhtār*, vol.III, pp.342-345, Charles Hamilton (tran.) *The Hedaya*, vol II, bk. 10 pp. 207, cf; al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. VI, p. 198, cf; Ṣāliḥ 'Abd al-Samī' al-Azhari, *al-Tāj wa al-Iklīl*, vol. VI, p. 82, Ibn al-Najjār, *Muntahā al-Irādāt*, vol. I, p. 559, cf; Abū Bakr al-Kashnāwī, *Ashal al-Madārik*, vol. III, p. 81.

when a foundling was found in a quarter inhabited by non-Muslims: firstly, the foundling was considered as a *kāfir*, secondly, if such a quarter was inhabited by a Muslim minority, the foundling could be considered as a Muslim because presumably the finder of such a foundling was a Muslim.³⁶ The Ḥanbalīs are reported to have claimed that the finder was allowed to take up the foundling even if the character of the finder was *mastūr al-ḥāl*, i.e. it is not known whether he is a person of *ʿadālah* or *khiyānah*.³⁷ This is because it is assumed that anyone who finds an abandoned child is considered as just (*ʿādil*), and his justice extends to matters such as guardianship of property, marriage and testimony (*shāhadah*) because the original rule (*al-aṣl*) says that a Muslim should be regarded as just as ʿUmar is reported to have said that:

‘All Muslims are just with one another’.³⁸

The *Majallah* provides:

‘Every foundling is reputed free and Mohammedan, even if the person who took him up was a non-Mohammedan...’.³⁹

³⁶Al-Shīrāzī, *al-Muhadhdhab*, vol. I, p. 435, cf; al-Mardāwī, *al-Inṣāf*, vol. VI, p. 435.

³⁷Al-Maqdisī, *al-ʿUddah Sharḥ al-ʿUmdah*, p. 262, Ibn Qudāmah, *al-Mughnī*, vol. V, p. 688, cf; Subḥī Maḥmaṣṣānī, *Turāth al-Khulafāʾ*, p.234.

³⁸Ibn Qudāmah, *al-Mughnī*, vol. V, p. 688, cf; Subḥī Maḥmaṣṣānī, *Turāth al-Khulafāʾ*, p.234.

³⁹The *Majallah* article 357.

VI. Doubt About the Legitimacy of the Abandoned Child

Since there is no decisive evidence that the abandoned child is illegitimate, Islamic law does not declare the child illegitimate. In fact, most jurists do not discuss whether the abandoned child is legitimate. However, the Mālikī jurist al-Dusūqī maintains the extraordinary and contradicting view that the abandoned child must have been legitimate when the mother was pregnant because people would have known this.⁴⁰ In one legal area there does seem to have been an attempt to treat the *laqīṭ* as *walad zinā*. This is particularly in the matter leading the prayer. We have already noted the Tradition in the *Muwatta'* where 'Umar b. 'Abd al-'Azīz stopped a man from leading the prayer because he did not know his father.⁴¹ There seems to be a tendency among the jurists to have doubts about the *laqīṭ*'s legitimacy in the matter of leading the prayer. Perhaps this was because it was thought by some that this religious action should only be undertaken by a person who had no question marks about his legitimacy.

VII. Maintenance and Upbringing of the Abandoned Child

There are five major problems that face the foundling and the state once

⁴⁰Al-Dusūqī, *Hāshiyat al-Dusūqī*, vol. IV, p. 124.

⁴¹*Cf.* chapter 2, pp. 64-66.

he or she is found. These are (i) maintenance and upbringing, (ii) bloodwit, (iii) marriage if a girl (iv) inheritance and (v) funeral prayer. The first of these is, at first, the most important. The other four concern the problem of walā'. A legitimate child would gain all of these through his father and the walā' of his father. An illegitimate child would gain them through his mother's family and the walā' of his mother. The foundling at the moment of being found, has no known father or mother, therefore he/she has to be provided with these from other sources. As far as the source of the abandoned child's maintenance is concerned, the following are the major discussions among the jurists.

i. Maintenance for the abandoned child without money - All four schools of law hold that the public treasury (*bayt al-māl*) is the institution which should be held responsible for the maintenance (*nafaqah*) of the foundling, if the child has no money.⁴² The maintenance from bayt al-māl is made as a result of the legal

⁴²Ibn Qudāmah, *al-Mughnī*, *op. cit.*, vol. V, p. 694, cf; al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. VIII, p. 39, cf; al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 61, cf; al-Ramlī, *Nihāyat al-Muhtāj*, vol. V, pp. 453-462, cf; al-Ḥaṣḥafī, *Sharḥ al-Durr al-Mukhtār*, vol. I, p. 491. Ibn Qudāmah, *al-Mughnī*, *op. cit.*, vol. V, p. 694, cf; al-ʿAsqalānī, *Fath al-Bārī*, vol. XII, p. 40, al-Burhānpūrī, *Kanz al-ʿUmmāl*, vol. XV, pp. 200 and 201, cf; al-Mirghīnānī, *al-Hidāyah*, vol. II, p. 173, Charles Hamilton, *The Hedaya*, p. 206, M. Zayd al-Abyānī, *Sharḥ al-Aḥkām al-Sharʿiyyah*, vol. I, p. 43, M. Kadri Pasha, *Mohammedan Personal Law*, p. 93, Nawab A.F.M. Abdur Rahman, *Institutes of Mussalman Law*, p. 195, al-Zaylāʿī, *Tabyin al-Ḥaqqāʿiq*, vol. III, p. 297, cf; Saḥnūn, *al-Mudawwanat al-Kubrā*, vol. III, p. 222, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. III, p. 80, al-Mawāq, *Mawāhib al-Jalīl*, printed in the margin of *Mawāhib al-Jalīl*, vol. vol. III, p. 80, al-Kashnāwī, *Ashal al-Madārik*, vol. III, p. 80, Aḥmad al-Dardīr, *Aqrab al-Masālik*, p. 170, Aḥmad al-Dardīr, *Aqrab al-Masālik* printed in the margin of Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 327, al-Dusūqī, *Hāshiyat al-Dusūqī*, vol. IV, p. 125, see also commentary by Muḥammad ʿAllīsh printed in the margin of al-Dusūqī, *Hāshiyat al-Dusūqī*, vol. IV, pp. 124-125, cf; al-Shāfiʿī, *al-Umm*, vol. VI, p. 268, al-Dimashqī, *Kifāyat al-Akhyār*, p. 320, al-Nawawī, *Minḥāj al-Ṭālibīn*, (translated by C.E. Howard), p. 241, Abū Shujāʿ, *Taqrīb* translated by A.A.Qadri, *A Sunni Shāfiʿi Law Code*, pp. 83-83, cf; al-Bahūtī, *Kashshaf al-Qināʿ*, vol. IV, p. 227, Ibn al-Najjār, *Muntahā al-ʿIrādāt*, vol. I, p. 559, al-Maqdisī, *al-ʿUddah Sharḥ al-Umdah*, p. 262, cf; Reuben Levy, *The Social Structure of Islam*, p. 141, cf; al-Mardāwī, *al-Inṣāf*, vol. VI, p. 433, Saḥnūn, *al-Mudawwanat al-Kubrā*, vol. VIII, p. 368.

requirement of necessity (*ḍarūrah*).⁴³

There are three Traditions which imply that the *bayt al-māl* would be responsible for the maintenance.

[a] `Abū Jamīlah Sunayn reported that he found a child which was wrapped in a blanket (*malfūfān*) and brought it to the caliph `Umar. When the caliph `Umar saw Abū Jamīlah carrying the child, `Umar accused that man of being a person who was trying to disown his own child (*ʿasā al-ghuyawru 'abu'sā*).⁴⁴ However, the leader of his group (*ʿarīfah*) approached `Umar saying that Abū Jamīlah was a pious man (*innahu rajul ṣāliḥ*). Then `Umar told Abū Jamīlah to take the child home and that he would be responsible for the *walā'*, while `Umar, on behalf of the state, would pay the maintenance'.⁴⁵

[b] `It is reported that a woman found an abandoned child, then she went to see *qāḍī* Shurayḥ asking about the child's maintenance. Shurayḥ told her that she would only be responsible for the *walā'*, not maintenance'.⁴⁶

[c] A *ḥadīth* is reported by Ibn Jurayj that:

⁴³Al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. VI, p. 199, cf; Abd al-Karīm Zaydān, *Majmū'ah Buḥūth Fiqhiyyah*, p. 363.

⁴⁴This saying, according to Ibn al-ʿArābī signifies anyone who was described as person who disowned his real son by claiming the child as foundling.[see Ibn Ḥajar al-ʿAsqalānī, *Fath al-Bārī*, vol. V, p. 325.]

⁴⁵Ibn Ḥajar al-ʿAsqalānī, *Fath al-Bārī*, vol. V, pp. 324-325, *Ṣaḥīḥ al-Bukhārī*, vol. p. 231, Mālik b. Anas, *al-Muwattaʿ*, p. 633, cf; Ibn Qudāmah, *al-Mughnī*, vol. V, p. 679, al-Shāfiʿī, *al-Umm*, vol. IV, p. 74, al-Suyūṭī, *Tanwīr al-Ḥawālik*, vol. II, p. 212, al-Bayhaqī, *al-Sunan al-Kubrā*, vol. VI, p.202 and vol. X, p. 298, al-Ṣanʿānī, *al-Muṣannaf*, vol. IX, p. 14 and vol. VII, pp.449-452, al-Burhānpūrī, *Kanz al-Ummāl*, vol. XV, pp. 200-201, al-Zurqānī, *Sharḥ al-Zurqānī*, vol. IV, pp 18-19, cf; Ibn Qudāmah, *al-Mughnī*, vol. V, p. 686.

⁴⁶Al-Ṣanʿānī, *al-Muṣannaf*, vol. IX, p. 16, cf;Ibn Qudāmah, *al-Mughnī*, vol. V, p. 686.

'A person found an abandoned child, then he brought it to the Caliph 'Umar. 'Umar told the finder to provide suckling from someone else and reclaim it from the bayt al-māl. 'Umar assigned the walā' to the finder of the child'.⁴⁷

The Majallah says:

'If a foundling has not been acknowledged and has no property and the finder refuses to meet the expenses necessary....the treasury of the state will provide for it...'.⁴⁸

It would seem from the above Traditions that the Muslim jurists required the finder to bring the foundling to the authorities represented by the Caliph or qāḍī so that the position of the foundling could be regularised in terms of the provisions of maintenance and upbringing of the child, and they delegated this duty to a member of the community. From the above Traditions and later discussions of the jurists it would appear that this person was usually the finder. Although the Mālikīs seem to be the only jurists to mention it, it is clear that this duty of maintenance and upbringing extended until the child, if a boy, reached the age of maturity so that he could provide for himself or, if a girl, until she got married.⁴⁹

⁴⁷Al-Ṣanʿānī, al-Muṣannaf, vol. IX, p. 16.

⁴⁸The Majallah article 364.

⁴⁹Ibn Abu Zayd, Bākūrat al-Saʿd - First Steps in Muslim Jurisprudence, (translated by Alexander David Russel and Abdullah al-Maʾmūn Suhrawardī), pp. 44-45, cf; al-Nafrāwī, al-Fawākih al-Dawānī, vol. II, p. 243, al-Ḥattāb, Mawāhib al-Jalīl, vol. III, p. 80, cf; Lāḥiḥat Majallat al-Aḥkām al-Sharʿiyyah, p.212, Abū Bakr al-Kashnāwī, Ashal al-Madarik, vol. III, p. 80.

In the event of the *bayt al-māl* being unable to provide maintenance for the foundling, the Mālikites maintain that the finder is responsible for providing maintenance and upbringing of the child (*an yuhḍinah wa an yunfiqa ʿalayh*).⁵⁰ However, if neither the *bayt al-māl* nor the finder has sufficient funds to provide for the foundling, the Mālikites maintain that the judge (*qāḍī*) has the discretion to give the foundling to a person who is reliable (*maʾmūn*) and able to manage the foundling's maintenance.⁵¹ The amount paid by that person could be regarded as the foundling's debt owed to him.⁵² For their part, the Ḥanafīs maintain that in this situation in order to avoid the foundling being neglected, the judge as the representative of the authorities still has the responsibility to take charge of the foundling under the provision of the so-called *wilāyat al-ilzām*. Therefore, the judge is allowed to force the finder to provide maintenance for the foundling where the amount paid by the finder would be considered as the foundling's debt owed to him.⁵³ The Shāfiʿīs go as far as holding that the judge

⁵⁰ *Lāʾihāt Majallat al-Aḥkām al-Sharʿiyyah*, p. 211, al-Mawāq, *al-Tāj wa al-Iklīl*, printed in the margin of *Mawāhib al-Jalīl*, vol. III, p. 80, Abū Bakr al-Kashnāwī, *Ashal al-Madārik*, vol. III, p. 80, Aḥmad al-Dardīr, *Aqrab al-Masālik*, p. 170, Aḥmad al-Dardīr, *Aqrab al-Masālik* printed in the margin of Aḥmad al-Ṣāwī, *Bulghat al-Salik*, vol. II, p. 327, al-Dusūqī, *Hāshiyat al-Dusūqī*, vol. IV, p. 125, see also commentary by Muḥammad ʿAlīsh printed in the margin of al-Dusūqī, *Hāshiyat al-Dusūqī*, vol. IV, pp. 124-125, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. III, p. 80.

⁵¹ Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. III, p. 82.

⁵² Al-Mawāq, *al-Tāj wa al-Iklīl* printed in the margin of al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. III, p. 81, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. III, pp. 80-81, cf; *Lāʾihāt Majallat al-Aḥkām al-Sharʿiyyah*, op.cit., p. 212, Aḥmad al-Ṣāwī, *Bulghat al-Salik*, vol. ii, p. 327, cf; ʿAbd al-Karīm Zaydān, *Majmūʿah Buḥūth Fiqhiyyah*, pp. 364-365, Aḥmad al-Dardīr, *Aqrab al-Masālik*, p. 170, cf; Aḥmad al-Dardīr, *Aqrab al-Masālik* in the margin of Aḥmad al-Ṣāwī, *Bulghat al-Salik*, vol. II, p. 327, Saḥnūn, *al-Mudawwanat al-Kubrā*, vol. VIII, p. 368.

⁵³ Al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 211, cf; al-Uzjandī, *Fatāwa Kaḍī Khān*, vol. III, p. 396, cf; *Lāʾihāt Majallat al-Aḥkām al-Sharʿiyyah*, p. 212, cf; *al-Fatāwa al-Hindiyyah*, vol. II, p. 289, al-Ḥaṣḥafī, *Sharḥ al-Durr al-Mukhtār*, vol. I, p. 491, Nawab A.F.M Abdur Rahman, *Institutes of Mussalman Law*, p. 194, Charles Hamilton (tran.) *The Hedaya*, vol II, bk. 10, pp. 206-207, cf; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, vol.

(*qāḍī*) would be allowed to borrow money whether from any individual in the community or from the rich people (*al-mūsirūn*).⁵⁴ The amount paid would be regarded as the foundling's debt owed to them.⁵⁵ On the other hand, according to the Ḥanbalites, the judge (*qāḍī*) is allowed to seek donations from any individual Muslim in the community because neglecting the foundling's maintenance would cause death. Any amount of donation collected would be regarded as a free gift (*tabarruʿ*).⁵⁶ As has already been noted from the Traditions already cited, it is the state, in terms of *bayt al-māl*, which is responsible for providing the expenses for the maintenance and upbringing of the child. However, there is a strong suggestion in the discussions of the jurists that it is actually the finder or anyone else appointed by the courts who provides these expenses. This leads to a discussion of whether or not the foundling is liable for the repayment of these expenses if he should find himself in a position to be able to repay them at a later date.

In the case of the finder providing maintenance of the foundling without

VI, p. 199.

⁵⁴ *Al-mūsirūn* according to the Shāfiʿīs signifies to those people who have surplus budget (*ziyādāh*) of one year. [see, al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 61.]

⁵⁵ Ibn Qudāmah, *al-Mughnī*, vol. VIII, p. 316, al-Ramlī, *Nihāyat al-Muḥtāj*, vol. V, p. 449, cf; al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 61, cf; al-Shirbīnī al-Khaṭīb, *Mughnī al-Muḥtāj*, vol. II, pp. 390-391, cf; *Hāshiyat al-Shaykh Sulaymān al-Jamal*, vol. III, pp. 615-616, see also Abū Zakariyyā al-Anṣārī, *Sharḥ al-Minhāj*, printed in the margin of *Hāshiyat al-Shaykh Sulaymān al-Jamal*, vol. III, pp. 615-616, cf; al-Dimashqī, *Kifāyat al-Akhyār*, p. 321.

⁵⁶ Ibn Qudāmah, *al-Mughnī*, vol. V, p. 683, cf; al-Bahūtī, *Kashshāf al-Qināʿ*, vol. IV, p. 227.

the judge's consent but with the intention of recovery, Shurayḥ and al-Nakha'ī are reported to have said that the amount paid to the foundling could be recovered from the foundling if the finder is able to present witnesses.⁵⁷ Conversely, al-Sha'bi, al-Thawrī, al-Awzā'ī, al-Shāfi'ī, Abū Ḥanīfah, al-Shaybānī and Ibn al-Mundhir hold that providing maintenance without prior sanction from the court would be considered as a free gift (*tabarru'*) even if the finder has the intention of recovery.⁵⁸ The Hanafīs maintain that the foundling could not be forced to pay any amount that has been made as a *tabarru'*. The finder in this context is regarded as *mutatawwi'* (one whose action is according to his own choice i.e. sheltering the foundling) so any act of free gift (*tatawwu'*) cannot be entitled to recovery (*ijād*).⁵⁹ Nevertheless, Aḥmad b. Ḥanbal is reported to have said that in case of providing maintenance without prior sanction from the judge when the intention of the amount is for recovery, then that amount should be taken from *bayt al-māl*.⁶⁰

⁵⁷Ibn Qudāmah, *al-Mughnī*, vol. V, p. 683.

⁵⁸Ibn Qudāmah, *al-Mughnī*, vol. V, p. 683, cf; Ṣubḥī Maḥmaṣṣānī, *Turāth al-Khulafā'*, p.234, cf; cf; Charles Hamilton, *The Hedaya*, vol. II, p. 206, al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. VI, p. 199, cf; Abū Bakr al-Kashnāwī, *Aṣḥal al-Madārik*, vol. III, p. 80, al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. V, 765, *Ḥāshiyat al-Shaykh Sulaymān al-Jamal*, vol. III, p. 621, al-Ramlī, *Nihāyat al-Muḥtāj*, vol. V, p. 463, cf; al-Zayla'ī, *Tabyīn al-Ḥaqā'iq*, vol. III, p. 297, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. X, pp. 210-211, cf; Charles Hamilton, *The Hedaya*, vol. II, p. 206, al-Ṭahāwī, *Mukhtaṣar al-Ṭahāwī*, p. 141, cf; al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. III, p. 80, cf; *Lā'ihat Majallat al-Aḥkām al-Shar'īyyah*, p.212, Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 327, al-Shāfi'ī, *al-Umm*, vol. III, p. 268, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 232.

⁵⁹Al-Sarakhsī, *al-Mabsūṭ*, vol. X, pp. 210-211, cf; al-Zayla'ī, *Tabyīn al-Ḥaqā'iq*, vol. III, p. 297, cf; Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. VI, p. 111.

⁶⁰Ibn Qudāmah, *al-Mughnī*, vol. V, p. 683, cf; al-Mardāwī, *al-Inṣāf*, vol. VI, p. 433.

ii. Maintenance of the abandoned child with property or money - It may be that the parents or mother of the foundling leave the child with money or property so that it can be used for the benefit of the child. They would probably do this if they had wealth and wished to avoid the punishment for *zinā*. According to the Mālikīs, if the foundling has money, the status of the finder is similar to that of a father.⁶¹ - meaning that the finder is allowed to take charge (*yaḥūzuhu lahu al-mutaqīt*) of such property even without the judge's supervision (*naẓar*).⁶² Thus, if the foundling has property but the finder provides maintenance from the money he owned, the amount paid to the foundling would be regarded as the foundling's debt owed to the finder. This is particularly if the intention of the finder was for recovery - not for God's reward in the Hereafter (*ḥisbah*) - provided the amount he spent for the foundling was testified by witnesses or in the case of the child's property being difficult to realise in cash (*muta^cassir al-infāq*) due to the nature of the property, or it being in the hands of another person.⁶³ The three other schools of Muslim jurists agree that the finder is allowed to utilise money belonging to the foundling if such a foundling has property.⁶⁴ According

⁶¹ See commentary by Muḥammad °Allīsh, printed in the margin of al-Dusūqī, *Hāshiyat al-Dusūqī*, vol. IV, p. 125.

⁶² Al-Dusūqī, *Hāshiyat al-Dusūqī*, vol. IV, p. 125.

⁶³ Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 327.

⁶⁴ Al-Ḥaṣḥafī, *Sharḥ al-Durr al-Mukhtār*, vol. I, p. 491, Nawab A.F.M Abdur Rahman, *Institutes of Mussalman Law*, p. 194, *Fatawa Kazi Khan*, vol. IV, p. 359, Charles Hamilton (tran.) *The Hedaya*, vol II, bk. 10, pp. 206-207, cf; al-Kāsānī, *Baddā' al-Ṣanā'ī*, vol. VI, p. 199, Muḥammad Zayd al-Abyānī Bek, *Sharḥ al-Aḥkam al-Shar'īyyah fī al-Aḥwal al-Shakhṣiyyah*, vol. I, p. 43, cf; al-Mardāwī, *al-Inṣāf*, vol. VI, p. 437, Ibn Qudāmah, *al-Mughnī*, vol. V, p. 684, cf; al-Ramlī, *Nihāyat al-Muḥtāj*, vol V, p. 453, al-Bijirmī, *Bijirmī °alā al-Khaṭīb*, vol. III, p. 288, Ibn Qāsim al-Ghazzī, *Matn Abū Shuja^c* printed in the margin of al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p.60, al-Shirāzī, *al-Muḥadhdhab*, vol. I, p. 435, al-

to the Ḥanafīs the maintenance of the foundling must (*wājib*) be taken from the foundling's property.⁶⁵ They hold that the property found with the foundling should be deemed the child's own.⁶⁶ A person sheltering the foundling, after having been authorised by the judge, is allowed to use a portion of such property for its maintenance.⁶⁷ The Shāfi'īs maintain that if the finder provides maintenance for the foundling without the judge's consent, the finder would become a guarantor (*ḍāmin*) for the foundling,⁶⁸ if complication occurs at a later date.⁶⁹

In the matter of whether the judge's authorisation is required when the foundling has property, the followers of the Ḥanbalī school of law are reported

Khaṭīb, *al-Iqnāʿ*, p. 376, al-Dimashqī, *Kifāyat al-Akhyār*, p. 320, al-Nawawī, *Minhaj al-Ṭālibīn wa ʿUmdat al-Muftīn*, p. 68, al-Shāfiʿī, *al-Umm*, vol. V, p. 268, A.A. Qadri, *A Sunni Shafi'i Law Code*, p. 83, al-Nawawī, *Minhaj al-Ṭālibīn* (translated by E.C. Howard.), p. 241, *Mukhtaṣar al-Muzanī*, vol. IX, p. 148.

⁶⁵ Al-Zaylaʿī, *Tabyīn al-Ḥaqāʾiq*, vol. III, p. 300, cf; M. Zayd al-Abyānī, *Sharḥ al-Aḥkām al-Sharʿiyyah fī al-Aḥwāl al-Shakhsiyyah*, vol. I, p. 43, cf; al-Ḥaṣkafī, *Sharḥ al-Durr al-Mukhtār*, vol. I, p. 490.

⁶⁶ Al-Ḥaṣkafī, *Sharḥ al-Durr al-Mukhtār*, vol. I, p. 491, Nawab A.F.M Abdur Rahman, *Institutes of Mussalman Law*, p. 194, al-Uzjandī, *Fatawa Kazi Khan*, vol. IV, p. 359, Charles Hamilton (tran.) *The Hedaya*, vol II, bk. 10, pp. 206-207, cf; al-Kāsānī, *Badāʾīʿ al-Ṣanāʾīʿ*, vol. VI, p. 199, cf; al-Zaylaʿī, *Tabyīn al-Ḥaqāʾiq*, vol. III, p. 297 and 300.

⁶⁷ Al-Zaylaʿī, *Tabyīn al-Ḥaqāʾiq*, vol. III, p. 297 and 300, al-Ḥaṣkafī, *Sharḥ al-Durr al-Mukhtār*, vol. I, p. 491, Nawab A.F.M Abdur Rahman, *Institutes of Mussalman Law*, p. 194, al-Uzjandī, *Fatawa Kazi Khan*, vol. IV, p. 359, Charles Hamilton (tran.) *The Hedaya*, vol II, bk. 10, pp. 206-207, cf; al-Kāsānī, *Badāʾīʿ al-Ṣanāʾīʿ*, vol. VI, p. 199, cf; *Mukhtaṣar al-Muzanī*, vol. IX, p. 148, cf; al-Dimashqī, *Kifāyat al-Akhyār*, p. 320, cf; al-Shīrāzī, *al-Muhadhdhab*, vol. I, p. 435, al-Bijirmī, *Bijirmī ʿlā al-Khaṭīb*, vol. III, p. 289, al-Khaṭīb, *al-Iqnāʿ*, p. 376, al-Ramlī, *Nihāyat al-Muḥtāj*, vol. V, p. 454, *Hāshiyat Qalyūbī*, vol. III, p. 126, *Hāshiyat cUmayrah*, vol. III, p. 127, *Mukhtaṣar al-Muzanī*, Vol. IX, p. 148, al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 61.

⁶⁸ *Mukhtaṣar al-Muzanī*, vol. IX, p. 148, cf; al-Dimashqī, *Kifāyat al-Akhyār*, p. 320, cf; al-Shīrāzī, *al-Muhadhdhab*, vol. I, p. 435, al-Bijirmī, *Bijirmī ʿlā al-Khaṭīb*, vol. III, p. 289, al-Khaṭīb, *al-Iqnāʿ*, p. 376, al-Ramlī, *Nihāyat al-Muḥtāj*, vol. V, p. 454, *Hāshiyat Qalyūbī*, vol. III, p. 126, *Hāshiyat cUmayrah*, vol. III, p. 127, al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 61.

⁶⁹ Al-Ramlī, *Nihāyat al-Muḥtāj*, vol. V, p. 454.

to hold two opinions: (i) when property is found with the foundling, the finder may spend some of it on the foundling without the permission of the judge; (ii) According to Abū al-Hārith, the finder would not be allowed to spend money belonging to the foundling without the sanction of the judge. This is because the finder of wealth is the equivalent of the deposittee and the latter is not allowed to part with any of the deposited property to the absent depositor's family without the permission of the judge. However, this argument is regarded as invalid by al-Shaykh Majd al-Dīn because the implication of it would be that the finder (as the deposittee) would know the depositor (i.e. the father) which he does not.⁷⁰

VIII. The Application of the Institution of the Walā' to the Foundling

As already mentioned, the foundling needs to be incorporated into Islamic law with regard to bloodwit, marriage (if the foundling is a girl), funeral prayers and inheritance. These matters are normally established through the nasab of a person. There were two other groups of people in Islamic society who also needed some legal instrument in order for these legal requirements to be fulfilled. They were the freed slave (*ʿatiq*) and the converts to Islām. In the case of the freed slave the legal institution of walā' was the means by which this was carried out. It seems that walā' was also used to meet these legal requirements

⁷⁰Ibn Rajab, *al-Qawāʿid*, p. 240, al-Mardāwī, *al-Insāf*, vol. VI, p. 437, cf; Ibn al-Najjār, *Muntahā al-ʿIrādāt*, vol. I, p. 559, cf; al-Bahūtī, *Kashshāf al-Qināʿ*, vol. IV, pp. 228-229, Ibn Qudāmah, *al-Mughnī*, vol. V, p. 686.

in the case of the converts and the foundling.

i. The walā' of the freed slave

Al-walā' in the Arabic language denotes *al-mu'āwanah wa al-muqārabah* meaning assistance and relationship.⁷¹ This designates in law a peculiar relationship, voluntarily established.⁷² A group of Muslim jurists including the Shāfi'īs hold a limited definition of walā'. According to them, it denotes a relationship which brings about ʿaṣabah (male agnatic relationship) other than the ʿaṣabah of nasab (*ʿuṣūbah mutarākhiyah ʿan ʿuṣūbat al-nasab*) resulting from setting free a slave.⁷³ However, the other group of jurists have understood al-walā' in Islamic law to be of two types. The first is called walā' al-ʿitiq or walā' al-ni'mah. Among these jurists, the Mālikīs also define walā' as a relationship between the one who frees a slave and the freed slave (*ittiṣāl bayn mu'tiq wa mu'taq*).⁷⁴ According to the Mālikīs, the mu'tiq would be entitled to the walā' if

⁷¹Charles Hamilton, *The Hedaya*, bk. xxxiii, p. 513, cf; al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. IV, p. 159, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, p. 81, cf; al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, p. 208, cf; al-Ramlī, *Nihāyat al-Muhtāj*, vol. VIII, p. 394, al-Dimashqī, *Kifāyat al-Akhyār*, p. 578, cf; Ibn Qāsim al-Ghazzī, *Matn Abū Shujā'* printed together with al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 365, al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 365, cf; al-Bijirmī, *Bijirmī ʿalā al-Khaṭīb*, vol. IV, p. 460, cf; Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 464.

⁷²F.A. Klein, *The Religion of Islām*, pp. 216-217, cf; F.H. Ruxton, *Mālikī Law*, p. 369.

⁷³Al-Ramlī, *Nihāyat al-Muhtāj*, vol. VIII, p. 394, cf; al-Dimashqī, *Kifāyat al-Akhyār*, p. 578, cf; Ibn Qāsim al-Ghazzī, *Matn Abū Shujā'* printed together with al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 365, cf; al-Bijirmī, *Bijirmī ʿalā al-Khaṭīb*, vol. IV, p. 460.

⁷⁴Aḥmad al-Dardīr, *al-Sharḥ al-Ṣaghīr li Aqrab al-Masālik* printed in the margin of Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 462.

the mu^ctiq has fulfilled the following characteristics; (i) the mu^ctiq was the owner of the freed slave mu^ctaq, (ii) the mu^ctiq was the one who freed the slave, (iii) the mu^ctiq was free (ḥurr), and (iv) the mu^ctiq and the freed slave have the same religion.⁷⁵

As far as walā' al-^citq is concerned, the majority of Muslim jurists hold that the relationship of walā' is established between the patron (i.e. the mu^ctiq) and the client (i.e. ṣatīq, the freed slave).⁷⁶ The establishment of such a relationship is based on three ḥadīths: (i) 'al-walā' li-man ṣ^ctaqa'⁷⁷ - according to the Ḥanafīs, this ḥadīth limits the relationship to the one who set free with the one who has been freed.⁷⁸

According to the majority, walā' al-^citq establishes the nasab of the manumitted slave by affiliating to the manumitter because the relationship of

⁷⁵ Al-Nafrāwī, al-Fawākih al-Dawānī, vol. II, p. 208.

⁷⁶ Al-Shāfi'ī, al-Umm, vol. IX, p. 91 and vol. IV, p. 74, cf; al-Bijirmī, Bijirmī ṣalā al-Khaṭīb, vol. IV, p. 462, cf; al-Kāsānī, Badā'ī' al-Ṣanā'ī', vol. IV, p. 159, cf; al-Sarakhsī, al-Mabsūṭ, vol. VIII, p. 82, cf; Ibn Qudāmah, al-Mughnī wa al-Sharḥ al-Kabīr, vol. VII, p. 279, cf; al-Maqdisī, al-Ṣuddah Sharḥ al-Ṣumdah, p. 339, cf; Ibn Rushd, Bidāyat al-Mujtahid, vol. II, p. 271, cf; al-Khaṭīb, al-Iqnā', p. 647, see also al-Khaṭīb, al-Iqnā' printed together with al-Bijirmī, Bijirmī ṣalā al-Khaṭīb, vol. IV, p. 462, cf; al-Bājūrī, Ḥāshiyat al-Bājūrī, vol. II, p. 365, cf; Patricia Crone, Roman Provincial and Islamic Law, p. 36.

⁷⁷ Musnad Aḥmad Ibn Ḥanbal, vol. VIII, p. 5759 ḥadīth no. 5761 and p. 5928 ḥadīth no. 5929.

⁷⁸ Ṣaḥīḥ Muslim bi-Sharḥ al-Nawawī, vol. X, p. 139; Ibn Ḥajar al-ʿAsqalānī, Fath al-Bārī, vol. XII, p. 40, al-Shawkānī, Nayl al-Awtār, vol. VI, p. 186, cf; al-Bājūrī, Ḥāshiyat al-Bājūrī, vol. II, p. 365, cf; Ibn Rushd, Bidāyat al-Mujtahid, vol. II, p. 271, cf; Charles Hamilton, The Hedaya, bk XXXIII, p. 513, cf; al-Zuhaylī, al-Fiqh al-Islamī, vol. VIII, p. 405, cf; al-Kaḥlānī, Subul al-Salam, vol. III, p. 11, cf; al-Dimashqī, Kifāyat al-Akhyār, p. 578, cf; F.H. Ruxton, Mālikī Law, p. 369, cf; Patricia Crone, Roman Provincial and Islamic Law, p. 36.

walā' could be regarded as similar to the relationship by consanguinity.⁷⁹ The general stipulation is contained in the ḥadīth 'al-walā' luḥmat ka-luḥmat al-nasab'. This ḥadīth proves the establishment of the relationship of patron and client (walā') would be similar to the relationship stemming from consanguinity (luḥmat al-nasab).⁸⁰ Thus, according to the majority, nasab lā yūrath wa-innamā yuwarriṭ bih'. The word 'yuwarriṭ bih' means that the walā' is not divided up like the inheritance but is only transferred to the closest or most senior agnatic relation.⁸¹ This is because the relationship of patron and client (walā') in a real sense is not divided up like the inheritance but is only transferred to the closest or most senior agnatic relation.⁸² This is because the relationship of patron and client (walā') in a real sense is not divided up like the inheritance but is only transferred from the manumitter (muṭtiq) after his death to the closest or most senior agnatic relation of the manumitter (muṭtiq) because the walā' was regarded as similar to a blood relationship (nasab) and blood relations of human being are regarded as an agnatical relationship (al-nasab ilā al-ʿaṣabāt dūn

⁷⁹Al-Kaḥlānī, Subul al-Salām, vol. IV, p. 144, cf; Ibn Rushd, Bidāyat al-Mujtahid, vol. II, p. 272, cf; al-Sarakhsī, al-Mabsūṭ, vol. VIII, p. 82, al-Shāfiʿī, al-Umm, vol. IV, p. 74, cf; al-Shīrāzī, al-Muḥadḍḥab, vol. II, p. 20. cf; al-Khaṭīb, al-Iqnāʿ, p.647, see also al-Khaṭīb, al-Iqnāʿ printed together with al-Bijirmī, Bijirmī ʿalā al-Khaṭīb, vol. IV, p. 462, cf; al-Bājūrī, Ḥāshiyat al-Bājūrī, vol. II, p. 365, al-Sarakhsī, al-Mabsūṭ, vol. IV, p. 97, al-Ṭaḥāwī, Mukhtaṣar al-Ṭaḥāwī, p. 397-398, al-Kāsānī, Badāʾiʿ al-Ṣanāʾiʿ, vol. IV, p. 162-163.

⁸⁰See Ibn Qudāmah, al-Mughnī, vol. VI, p. 449-450, al-Sarakhsī, al-Mabsūṭ, vol. VIII, p. 82, cf; al-Kāsānī, Badāʾiʿ al-Ṣanāʾiʿ vol. IV, p. 160.

⁸¹Ibn Qudāmah, al-Mughnī, vol. VI, pp.352-353.

⁸²F.H. Ruxton, Mālikī Law, p. 369, cf; al-Kāsānī, Badāʾiʿ al-Ṣanāʾiʿ, vol. IV, p. 159, cf; Ibn Qudāmah, al-Mughnī wa al-Sharḥ al-Kabīr, vol. VII, p. 278, cf; al-Bahūtī, Kashshāf al-Qināʿ, vol. IV, p. 232, cf; Patricia Crone, Roman Provincial and Islamic Law, p. 36, Ibn Qudāmah, al-Mughnī, vol. VI, pp.352-353.

ghayrihim) which would not be capable of being divided up (*lā yūrath wa innamā yuwarriṭh bih*), even though, the other property left by the manumitter's heir would be allowed to be inherited according to the laws of inheritance.⁸³ As the *Encyclopaedia of Islam* stresses this point in the following words:

'One cannot sell or give a way *nasab* as various authorities point out in ḥadith. Equally *walā'* cannot be inherited in the strict sense of the word; the devolution of the rights and duties vested in the tie follows special rules ensuring that the relationship functions like an agnatic tie.'⁸⁴

According to the majority, the relationship of patron and client (*walā'*) gives rise to four major legal functions relating to the former and the latter, i.e. the responsibility of the payment of bloodwit (*diyāh*),⁸⁵ the guardianship of marriage, funeral prayers,⁸⁶ and inheritance.⁸⁷ Both parties involved in this

⁸³Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 271, cf; al-Ramlī, *Nihāyat al-Muḥtāj*, vol. VIII, pp. 394-395, Ibn Qudāmah, *al-Mughnī*, vol. VI, p.352 and 376-7, see also al-Maqdisī, *al-Uddah Sharḥ al-Umdah*, p. 344, al-Nawawī, *Minḥāj al-Tālibīn wa Umdat al-Muftīn*, p. 147, see also al-Nawawī, *Minḥāj al-Tālibīn*, (translated by E.C. Howard), p. 543.

⁸⁴See Patricia Crone v. 'mawlā' in *ET*, vol. VI, 1991, p. 882.

⁸⁵See for example, al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 364, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 274, al-Dimashqī, *Kifāyat al-Akhyār*, p. 578, al-Ramlī, *Mughnī al-Muḥtāj*, vol. VIII, p. 394, al-Khaṭīb, *al-Iqnā'*, p. 684, see also al-Khaṭīb, *al-Iqnā'* printed together with al-Bijirmī, *Bijirmī 'alā al-Khaṭīb*, vol. IV, p. 460, Neil B.E Baillie, *A Digest of Moohummadan Law*, pp. 387-389. The consequence of relationship of patron and client *walā'*, the first party, i.e. the *mawlā 'alā'* would be entitled to inherit from the second party, he would also be regarded as the 'aqilah of the second party and be responsible to pay bloodwit if the second party commits any crime involving bloodwit (*diyāh*). As far as the relationship of both parties in *walā'* is concerned, the relationship of both parties would be similar to *ilād*, i.e. membership (*ahliyyah*), ownership (*mālikiyyah*) and authority (*wilāyah*). [al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. IV, p. 160, see also, al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, p. pp. 81-82.

⁸⁶See for example, al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 364, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 274, al-Dimashqī, *Kifāyat al-Akhyār*, p. 578, al-Ramlī, *Mughnī al-Muḥtāj*, vol. VIII, p. 394, al-Khaṭīb, *al-Iqnā'*, p. 684, see also al-Khaṭīb, *al-Iqnā'* printed together with al-Bijirmī, *Bijirmī 'alā al-Khaṭīb*, vol. IV, p. 460, Neil B.E Baillie, *A Digest of Moohummadan Law*, pp. 387-389,

relationship are called mawlā. The first party, the manumitter (*mu^ctīq*) is called mawlā a^clā and the second party, the manumitted slave (*‘atīq*) is called mawlā adnā. The word ‘mawlā’ derived from the Qur’ānic al-Nisā’:33 which says:

‘And unto each We have appointed mawālī of that which parents and near kindred leave; and as for those with whom your right hands have made a covenant, give them their due. Lo! Allāh is ever Witness over all things.’

Al-Qurtubī while discussing this Qur’ānic verse says:

‘The word mawlā (p. *mawālī*) is a combined term (*lafz mushtarak*) which had varying meanings in different contexts as follows: (i) mawlā refers to both the manumitter (*mu^ctīq*) and the manumitted slave (*mu^ctaq*) or the upper and the lower mawlā,⁸⁸ (or as the Encyclopaedia of Islām says, ‘The term mawlā would also apply to the former lord (patron) in his relation to his freed man.’⁸⁹) (ii) mawlā also denotes a helper. In this regards al-Qur’ān says, ‘That is because Allāh is patron (*mawlā*) of those who believe, and because the disbelievers have no patron (*mawlā*)’. [al-Qur’ān, Muḥammad (47):11.] (iii) mawlā is used to express the relationship

Bijirmī ‘alā al-Khaṭīb, vol. IV, p. 460, Neil B.E Baillie, *A Digest of Moohummadan Law*, pp. 387-389, al-Kāsānī, *Badā’i‘ al-Ṣanā’i‘*, vol. IV, p. 160, al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, p.pp. 81-82.

⁸⁷ See for example, al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 364, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 274, al-Dimashqī, *Kifāyat al-Akhyār*, p. 578, al-Ramlī, *Mughnī al-Muḥtāj*, vol. VIII, p. 394, al-Khaṭīb, *al-Iqnā‘*, p. 684, see also al-Khaṭīb, *al-Iqnā‘* printed together with al-Bijirmī, *Bijirmī ‘alā al-Khaṭīb*, vol. IV, p. 460. Even though the Ḥanafīs silent whether the patron (*mawlā*) has prior right to lead funeral prayers in the case of the death of the freed slave, i.e. the second party. [Neil B.E Baillie, *A Digest of Moohummadan Law*, pp. 387-389.], but as it was clearly mentioned by al-Kāsānī, the consequence of relationship of patron and client *walā‘*, the first party would be allowed to inherit from the second party. [al-Kāsānī, *Badā’i‘ al-Ṣanā’i‘*, vol. IV, p. 160, see also, al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, p.pp. 81-82.

⁸⁸ al-Nisāburī, *Asbāb al-Nuzūl*, p. 86, cf; al-Qurtubī, *Tafsīr al-Qurtubī*, vol. V, p.167, al-Ṭabarī, *Tafsīr al-Ṭabarī*, vol. VIII, pp. 269-271, cf; al-Zuhaylī, *al-Fiqh al-Islamī*, vol. VIII, p. 404.

⁸⁹ A.J. Wensinck, see v. ‘mawlā’ in *Et*, 1991, p. 874.

between paternal cousins, (their legal heirs and their brothers.⁹⁰ (iv) mawla also denotes the reciprocal relationship involved in neighbourly protection (*al-jār*). (v) mawla denotes agnates (*ʿaṣabah*) or those who could act as walī i.e. father, brother, cousin etc.⁹¹

1. Bloodwit - According to the Shāfiʿīs and the Mālikīs, there are three institutions involved in the responsibility of paying bloodwit (*diyah*): (a) kinship (*qarābah*) but not kinship outside the agnates (*qarābah laysat bi-ʿaṣabah*), (b) patronage (*walāʾ*) and (c) public treasury (*bayt al-māl*).⁹² This is because Muslim jurists hold that the consequences arising out of the relationship of patron and client between the muʿtiq and ʿatīq, the muʿtiq becomes the ʿāqilah of the one who has been set free. If the latter commits any crime involving bloodwit (*diyah*), the former will be liable for the payment of the bloodwit as required.⁹³ All school of laws agree that in the first and second case it is the ʿāqilah who acts on behalf of the guilty party.⁹⁴ However, if there are no surviving

⁹⁰ Al-Ṭabarī, *Tafsīr al-Ṭabarī*, vol. VIII, pp. 269-270, cf; al-Qurtubī, *Tafsīr al-Qurtubī*, vol. V, p. 167.

⁹¹ Al-Qurtubī, *Tafsīr al-Qurtubī*, vol. V, p. 167, cf; al-Ṭabarī, *Tafsīr al-Ṭabarī*, vol. VIII, pp. 269-271, cf; al-Zuhaylī, *al-Fiḥ al-Islamī*, vol. VIII, p. 404, cf; al-Nisāburi, *Asbāb al-Nuzūl*, p. 86.

⁹² Al-Khaṭīb, *al-Iqnāʿ*, p. 496, see also al-Khaṭīb, *al-Iqnāʿ* printed together with al-Bijirmī, *Bijirmī ʿalā al-Khaṭīb*, vol. IV, p. 122, cf; al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, pp. 259-270.

⁹³ Al-Ramlī, *Nihāyat al-Muḥtāj*, vol. VIII, p. 394, cf; al-Dimashqī, *Kifāyat al-Akhyār*, p. 578, cf; Ibn Qāsim al-Ghazzī, *Matn Abū Shujāʿ* printed together with al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 365, cf; al-Bijirmī, *Bijirmī ʿalā al-Khaṭīb*, vol. IV, p. 460, cf; Charles Hamilton, *The Hedaya*, bk. XXXIII, p. 513, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, p. 82, cf; Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 279, al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 364, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 274, al-Dimashqī, *Kifāyat al-Akhyār*, p. 578, al-Khaṭīb, *al-Iqnāʿ*, p. 684, see also al-Khaṭīb, *al-Iqnāʿ* printed together with al-Bijirmī, *Bijirmī ʿalā al-Khaṭīb*, vol. IV, p. 460, Neil B.E Baillie, *A Digest of Moohummadan Law*, pp. 387-389, al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, vol. IV, p. 160.

⁹⁴ R. Brunshvig see v. 'ʿĀqilah' in *El'* pp. 337-340. For the Shāfiʿī school of law see for example the work of al-Khaṭīb, *al-Iqnāʿ*, p. 496, see also al-Khaṭīb, *al-Iqnāʿ* printed together with al-Bijirmī, *Bijirmī ʿalā al-Khaṭīb*, vol. IV, p. 122, for the school of Mālikīs see for example al-Nafrāwī, *Fawākih al-Dawānī*, vol. II, p. 259-263, for the Ḥanafīs see, al-Ṭahāwī, *Mukhtaṣar al-Ṭahāwī*, p. 233, for the

agnates, the responsibility for the bloodwit falls on *bayt al-māl*.⁹⁵

2. Guardianship in Marriage - Muslim jurists hold that a patron is regarded as one in a sequence of members of the agnatical relations who is responsible as the guardian of a female manumitted slave when marriage takes place.⁹⁶ The

Ḥanbalīs see Muwaffaq al-Dīn Ibn Qudāmah, *Umdat al-Fiqh*, p. 126.

⁹⁵ Al-Khaṭīb, *al-Iqnāʿ*, pp. 496-497, see also al-Khaṭīb, *al-Iqnāʿ* printed together with al-Bijirmī, *Bijirmī ʿalā al-Khaṭīb*, vol. IV, pp. 122-123, cf; al-Ramlī, *Nihāyat al-Muḥtāj*, vol. VII, pp. 371-372. Regarding who should be included in the *ʿāqilah*, Muslim jurists differ with each other. For example, the Ḥanafīs and the Mālikīs hold that women and children should be included in the *ʿāqilah*. [al-Ṭaḥāwī, *Muḥtaṣar al-Ṭaḥāwī*, p. 233, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, 270.] However, the Ḥanbalīs maintain children, insane and poor are not included. [Muwaffaq al-Dīn b. Qudāmah, *Umdat al-Fiqh*, p. 126.] Regarding the number of individuals who should be included in the *ʿāqilah*, it is of interest to note the Mālikī school of law reveal two reports. The first report says, the *ʿāqilah* comprises seventy male individuals who were affiliated or attributed to one father. In the case of the number of the individuals who are attributed to one father was less than seventy persons, it could be completed by adding other individuals even if they were not attributed to one father. However, the second report says, the *ʿāqilah* comprises more than one thousand persons but when the number of the individuals is less than one thousand, other individual could also be allowed to join the members of the *ʿāqilah* and as far as the payment of bloodwit is concerned, the amount required should be divided equally among the *ʿāqilah*'s member. [al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, 270.] According to the Mālikīs, this includes the rich, the poor, the minor, the insane, the woman and the debtor (*gharīm*). Other than these individuals could not be regarded as the *ʿāqilah* or could not be held responsible to pay bloodwit. [al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, 270.] However, the Shāfiʿīs hold that the woman, children and insane (*maʿtūh*) were not included in the *ʿāqilah* even if they were rich because according to the Shāfiʿites, there are five qualities which is associated with the *ʿāqilah*, i.e. male (*dhukūrah*), rich (*ʿadam al-faqr*), free (*ḥurriyyah*), responsibility (*taklīf*) and same religion (*ittifāq al-dīn*). [al-Khaṭīb, *al-Iqnāʿ*, pp. 496-697, see also al-Khaṭīb, *al-Iqnāʿ* printed together with al-Bijirmī, *Bijirmī ʿalā al-Khaṭīb*, vol. IV, p. 122, see also al-Khaṭīb, *al-Iqnāʿ* printed together with al-Khaṭīb, *Bijirmī ʿalā al-Khaṭīb*, vol. IV, p. 123, see also al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 203, cf; al-Ramlī, *Nihāyat al-Muḥtāj*, vol. VII, pp. 374.]

⁹⁶ See for example, al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 364, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 274, al-Dimashqī, *Kifāyat al-Akhyār*, p. 578, al-Shirbīnī al-Khaṭīb, *Mughnī al-Muḥtāj*, vol. VIII, p. 394, al-Khaṭīb, *al-Iqnāʿ*, p. 684, see also al-Khaṭīb, *al-Iqnāʿ* printed together with al-Bijirmī, *Bijirmī ʿalā al-Khaṭīb*, vol. IV, p. 460, cf; Aḥmad Ibrahim Bek, *al-Aḥkām al-Sharʿiyyah*, p. 21, Neil B.E Baillie, *A Digest of Moohummadan Law*, pp. 387-389, al-Kāsānī, *Badāʾiʿ al-Ṣanāʿiʿ*, vol. IV, p. 160, al-Mawāq, *al-Tāj wa al-Iklīl* printed in the margin of al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. VI, pp. 359-363. al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, pp. 81-82, cf; Ibn Qāsim al-Ghazzī, *Sharḥ Matn al-Shaykh Abū Shujāʿ* printed together with al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 365.

Mālikīs while discussing the sequence of the agnatical relationship hold that the priority of the sequence in the guardianship of marriage is similar in the sense that the priority should go to the son of the manumitter, if the manumitter's son has already died, the son direct male descendants would take place, otherwise, the father, the brother, the son's brother, the grandfather, the uncle (°amm), the son of the uncle (ibn °amm) and then his male direct descendants, the father of the grandfather and male descendants.⁹⁷

3. Funeral Prayers - According to all jurists, a patron (*mu°tiq*) who was regarded as one in a sequence of members of the agnatical relations should be responsible to lead the funeral prayers if the manumitted slave dies.⁹⁸ Similarly in the case of the abandoned child who dies, the *walī* should be allowed to lead the funeral prayers (*al-ṣalāt °alayh*).⁹⁹ This is because, as we will discuss later,

⁹⁷ Al-Mawāq, *al-Tāj wa al-Iklīl* printed in the margin of al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. VI, pp. 359-363.

⁹⁸ See al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 364, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 274, al-Dimashqī, *Kifāyat al-Akhyār*, p. 578, al-Shirbīnī al-Khaṭīb, *Mughnī al-Muḥtāj*, vol. VIII, p. 394, al-Khaṭīb, *al-Iqnā°*, p. 684, see also al-Khaṭīb, *al-Iqnā°* printed together with al-Bijirmī, *Bijirmī °alā al-Khaṭīb*, vol. IV, p. 460, cf; Aḥmad Ibrahim Bek, *al-Aḥkām al-Shar°iyyah*, p. 21, Neil B.E. Baillie, *A Digest of Moohummadan Law*, pp. 387-389, al-Kāsānī, *Badā°i° al-Ṣanā°i°*, vol. IV, p. 160, al-Mawāq, *al-Tāj wa al-Iklīl* printed in the margin of al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. VI, pp. 359-363, al-Sarakhsī, *al-Mabsūt*, vol. VIII, pp. 81-82, cf; Ibn Qāsim al-Ghazzī, *Sharḥ Matn al-Shaykh Abū Shujā°* printed together with al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 365.

⁹⁹ See for example, al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 364, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 274, al-Dimashqī, *Kifāyat al-Akhyār*, p. 578, al-Shirbīnī al-Khaṭīb, *Mughnī al-Muḥtāj*, vol. VIII, p. 394, al-Khaṭīb, *al-Iqnā°*, p. 684, see also al-Khaṭīb, *al-Iqnā°* printed together with al-Bijirmī, *Bijirmī °alā al-Khaṭīb*, vol. IV, p. 460, cf; Aḥmad Ibrahim Bek, *al-Aḥkām al-Shar°iyyah*, p. 21, Neil B.E. Baillie, *A Digest of Moohummadan Law*, pp. 387-389, al-Kāsānī, *Badā°i° al-Ṣanā°i°*, vol. IV, p. 160, al-Mawāq, *al-Tāj wa al-Iklīl* printed in the margin of al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, vol. VI, pp. 359-363, al-Sarakhsī, *al-Mabsūt*, vol. VIII, pp. 81-82, cf; Ibn Qāsim al-Ghazzī, *Sharḥ Matn al-Shaykh Abū Shujā°* printed together with al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 365.

the relationship stemming from walā' is similar to a relationship of consanguinity where the patron is the walī of the manumitted slave. The same rule applies to the abandoned child. Thus, according to the majority including Abū Ḥanīfah and Muḥamad al-Shaybānī, in most cases (*fi al-ghālib*), any child who is born in the Islamic state (*dār al-Islām*) would have an heir (*wārith*) who was regarded as the real guardian (*mutaḥaqqiq*) or if the child, like a foundling who has no heir, the sultān would be regarded as the guardian of the foundling.¹⁰⁰ In a ḥadīth, the Prophet is reported to have said:

'The sultān is the guardian to those who have no guardians (*al-sultān walī man lā waliya lah*)'.

The foundling has no guardian, so the authorities (sultān) would be regarded as the legitimate guardian of the foundling.¹⁰¹ The sultān stands as the representative of the Muslim community in order that the rights of the Muslim community may be carried out.¹⁰² The Prophet is also reported to have said:

'I am more responsible for every believer than he is for himself. Whoever owes a debt (which cannot be covered from his estate) or a destitute

¹⁰⁰ Al-Ramlī, *Nihāyat al-Muḥtaḥ*, vol. V, pp. 458-459, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 218, cf; al-Zaylā'ī, *Tabyīn al-Ḥaqqā'i*, vol. III, p. 271 al-Dusūqī, *Ḥāshiyat al-Dusūqī*, vol. IV, p. 240, cf; al-Mardāwī, *al-Inṣāf*, vol. VI, p. 446, al-Zaylā'ī, *Tabyīn al-Ḥaqqā'i*, vol. III, p. 271, *Kanz al-Daqqā'i*, printed together with al-Zaylā'ī, *Tabyīn al-Ḥaqqā'i*, vol. III, p. 271, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 218, cf Ibn Qudāmah, *al-Mughnī*, vol. V, p. 570.

¹⁰¹ Ibn Qudāmah, *al-Mughnī*, vol. V, p. 682.

¹⁰² Ibn Qudāmah, *al-Mughnī*, vol. V, pp. 682-570, cf; al-Bahūtī, *Kashshāf al-Qinā'*, vol. IV, p. 232, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 220, cf; al-Zaylā'ī, *Tabyīn al-Ḥaqqā'i*, vol. III, p. 271, cf; al-Ramlī, *Nihāyat al-Muḥtaḥ*, vol. V, pp. 458-459, al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 218, al-Mardāwī, *al-Inṣāf*, vol. VI, p. 446, Ibn Qudāmah, *al-Mughnī*, vol. V, p. 682.

family, it is my responsibility. Who leaves property, it is for heirs. I am the patron (*mawlā*) of those who have no patron (*mawlā*) and I inherit his property, I free him (with a ransom) if he is a prisoner. (Similarly), the mother's brother (*khāl*) is the patron (*mawlā* i.e. also *wālī*) of one who has no patron; he inherits his property, he frees him (with a ransom) when he is a prisoner'.¹⁰³

4. Inheritance - the *wālī al-ʿitq* may confer the right of inheritance on one or both parties in this relationship.¹⁰⁴ All Muslim jurists hold, when the slave who had been freed by the patron dies, leaving no heir, the one who sets him free would be entitled to the inheritance.¹⁰⁵ The *mawlā al-lā* could be allowed to

¹⁰³Ibn Qudāmah, *al-Mughnī*, vol. VI, p. 202. In *Sunan Abū Dāʿūd*, the *ḥadīth* says, 'anā awlā bi-kullī mu'min min nafsih, fa-man taraka daynan aw dayʿatan (landed estate) fa-ilayya, wa man taraka mālan fa-liwarathatih wa anā mawlā man lā mawlā lah, arithu mālahū, wa 'afukku ʿānahū, wa-alkāl mawlā man lā mawlā lahū, yarithu mālahū wa yafukku ʿānahū. [al-Sijistānī, *Sunan Abū Dāʿūd*, vol. III, p. 123.]

¹⁰⁴F.A. Klein, *The Religion of Islām*, pp. 216-217, cf; F.H. Ruxton, *Mālikī Law*, p. 369, al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 364, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 274, al-Dimashqī, *Kifāyat al-Akhyār*, p. 578, al-Shirbīnī al-Khaṭīb, *Mughnī al-Muḥtāj*, vol. VIII, p. 394, al-Khaṭīb, *al-Iqnāʿ*, p. 684, see also al-Khaṭīb, *al-Iqnāʿ* printed together with al-Bijirmī, *Bijirmī ʿalā al-Khaṭīb*, vol. IV, p. 460, Neil B.E. Baillie, *A Digest of Moohummadan Law*, pp. 387-389, al-Kāsānī, *Badāʿī ʿal-Ṣanāʿī*, vol. IV, p. 160, see also, al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, pp. 81-82.

¹⁰⁵*Ṣaḥīḥ Muslim bi-Sharḥ al-Nawawī*, vol. X, p. 139; Ibn Ḥajar al-ʿAsqalānī, *Fath al-Bārī*, vol. XII, p. 40, al-Shawkānī, *Nayl al-Awtār*, vol. VI, p. 186, F.H. Ruxton, *Mālikī Law*, p. 369, cf; al-Kāsānī, *Badāʿī ʿal-Ṣanāʿī*, vol. IV, pp. 159-173, cf; Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, pp. 271-278, cf; al-Bahūtī, *Kashshāf al-Qināʿ*, vol. IV, p. 232, cf; Patricia Crone, *Roman Provincial and Islamic Law*, p. 36, cf; al-Ramlī, *Nihāyat al-Muḥtāj*, vol. VIII, pp. 394-395, Ibn Qudāmah, *al-Mughnī*, vol. VI, p. 352 and 376-7, see also al-Maqdisī, *al-ʿUddah Sharḥ al-ʿUmdah*, pp. 340-345, cf; al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 365, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, pp. 271-272, cf; al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VIII, p. 405, cf; Charles Hamilton, *The Hedaya*, bk XXXIII, p. 513, cf; al-Bahūtī, *Kashshāf al-Qināʿ*, vol. IV, p. 232, cf; Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 274, cf; Subḥī Maḥmaṣṣānī, *Turāth al-Khulafāʾ*, p. 398, cf; F.H. Ruxton, *Mālikī Law*, p. 369, al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, p. 292, al-Tirmidhī, *Sunan al-Tirmidhī*, vol. IV, p. 46, al-Darīmī, *Sunan al-Darīmī*, vol. II, p. 398, al-Sijistānī, *Sunan Abū Dāʿūd*, vol. III, p. 127, al-Kaḥlānī, *Subul al-Salām*, vol. IV, p. 144 and vol. III, p. 11, cf; al-Suyūṭī, *Tanwīr al-Hawālik*, vol. III, p. 9, cf; Mālik b. Anas, *al-Muwattaʾ*, (translated by Aisha Abdurrahman Bewley), p. 324, cf; al-Shīrāzī, *al-Muhadhdhab*, vol. II, p. 20 and 21, cf; al-Ṭaḥāwī, *Muḥtaṣar al-Ṭaḥāwī*, pp. 396-397, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, pp. 97-98, cf; Aḥmad al-Dardīr, *Aqrab al-Masālik*, p. 195, al-Bājūrī, *Ḥāshiyat al-Bājūrī*, p. 365, cf; al-Dimashqī, *Kifāyat al-Akhyār*, p. 578-579, cf; al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, pp. 208-209, Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 462, cf; al-Shirbīnī al-Khaṭīb, *Mughnī al-Muḥtāj*, vol. VIII, p. 395, cf; Gertrude H. Stern, *Marriage in Early Islām*, p. 166, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol.

inherit from *mawlā adnā*,¹⁰⁶ even though there was no relationship of kinship (*rahm*) or marriage (*nikāh*).¹⁰⁷ Al-Qurtubī further says:

‘According to the majority, the male agnates, entitled to inheritance, include the upper, but not the lower *mawlā*. This is because it is understood to be a right of the manumitter by virtue of the fact that he is the one who has made an act of generosity (*in‘ām*) to the manumitted slave as if he was like his father. Thus, according to this meaning, the *mu‘tiq* would be allowed to inherit from the manumitted slave. However, al-Ṭaḥāwī says that it has been related by al-Ḥasan b. Ziyād that the lower *mawlā* is allowed to inherit from the upper. He justifies this with a ḥadith of the Prophet which reported that when a man who freed a slave died leaving [no heir], the Prophet allowed the inheritance left by the *mu‘tiq* to be inherited by the manumitted slave (*mu‘taq*). Al-Ṭaḥāwī

II, p. 208.

¹⁰⁶ Al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, p. 292, al-Tirmidhī, *Sunan al-Tirmidhī*, vol. IV, p. 46, al-Dārimī, *Sunan al-Dārimī*, vol. II, p. 398, al-Sijistānī, *Sunan Abū Dā‘ūd*, vol. III, p. 127, al-Kaḥlānī, *Subul al-Salām*, vol. IV, p. 144, cf; al-Suyūṭī, *Tanwīr al-Hawālik*, vol. III, p. 9, cf; Mālik b. Anas, *al-Muwatta‘*, (translated by Aisha Abdurrahman Bewley), p. 324, Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 272, cf; al-Shīrāzī, *al-Muhadhdhab*, vol. II, pp. 20-21, cf; al-Kāsānī, *Badā‘i al-Ṣanā‘i‘*, vol. IV, p. 173, cf; al-Ṭaḥāwī, *Mukhtaṣar al-Ṭaḥāwī*, p. 397, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, pp. 97-98, cf; Aḥmad al-Dardīr, *Aqrab al-Masālik*, p. 195, cf; al-Dimashqī, *Kifāyat al-Akhyār*, p. 578-579, cf; al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, pp. 208-209, *Ṣaḥīḥ Muslim bi-Sharḥ al-Nawawī*, vol. X, p. 139; Ibn Ḥajar al-‘Asqalānī, *Fath al-Bārī*, vol. XII, p. 40, al-Shawkānī, *Nayl al-Awtār*, vol. VI, p. 186, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 271, cf; Charles Hamilton, *The Hedaya*, bk XXXIII, p. 513, cf; al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VIII, p. 405, cf; al-Kaḥlānī, *Subul al-Salām*, vol. III, p. 11, cf; F.H. Ruxton, *Mālikī Law*, p. 369, cf; Patricia Crone, *Roman Provincial and Islamic Law*, p. 36, cf; S.C. Sircar, *al-Sharia‘a*, pp. 176-177. However, it is reported that the relationship involved in (*walā‘*) is not capable of being sold or given away (*hibah*). According to the Mālikīs, it is invalid for a person selling a slave to make a condition that the *walā‘* would belong to him if the purchaser sold the slave because *walā‘* is established with the one who sets free, not the seller. [see Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 462]. Even a woman is reported to have been allowed to inherit the property of her slave or *mawlā*. This is made clear in the case of Barīrah whom A‘ishah emancipated after having bought her from her owners, who wished to retain the right to inherit her property. The Prophet Muḥammad is reported to have decreed that the right belonged to the person, or persons, who bought a slave and freed him or her. [see al-Ṭaḥāwī, *Mukhtaṣar al-Ṭaḥāwī*, p. 396, cf; al-Ramlī, *Mughnī al-Muḥtāj*, vol. VIII, p. 395, cf; al-Maqdisī, *al-‘Uddah Sharḥ al-‘Umdah*, p. 345, cf; Gertrude H. Stern, *Marriage in Early Islām*, p. 166.]

¹⁰⁷ *Ṣaḥīḥ Muslim bi-Sharḥ al-Nawawī*, vol. X, p. 139; Ibn Ḥajar al-‘Asqalānī, *Fath al-Bārī*, vol. XII, p. 40, al-Shawkānī, *Nayl al-Awtār*, vol. VI, p. 186, cf; al-Bājūrī, *Hāshiyat al-Bājūrī*, vol. II, p. 365, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 271, cf; al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VIII, p. 405, cf; Charles Hamilton, *The Hedaya*, bk XXXIII, p. 513, al-Kāsānī, *Badā‘i al-Ṣanā‘i‘*, vol. IV, pp. 159-160, al-Kaḥlānī, *Subul al-Salām*, vol. III, p. 11, cf; al-Bahūtī, *Kashshāf al-Qinā‘*, vol. IV, p. 232, cf; Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 274, cf; al-Maqdisī, *al-‘Uddah Sharḥ al-‘Umdah*, p. 340, cf; Subḥī Maḥmasānī, *Turāth al-Khulafā‘*, p. 398, cf; F.H. Ruxton, *Mālikī Law*, p. 369.

further argues that since there is no opposition (*mu'ārid*) to this *ḥadīth*, it is necessary to accept this ruling. There is a possibility that the manumitted slave be allowed to inherit from the manumitter because the manumitter *mu'tiq* was assumed to be like the father of the manumitted slave and therefore the lower *mawlā* could be regarded as his son. Both of them would be allowed to inherit from each other because the relationship includes both parties (*ya'umm*). (This is further supported) in the Tradition from the Prophet, 'the *mawlā* (i.e. the manumitted slave) is a member of the family of the manumitter (*mawlā al-qawm minhum*).'¹⁰⁸ However, the majority maintain that the entitlement of inheritance should be based (only) on kinship and there is no kinship between the upper *mawlā* and the lower *mawlā* but the manumitter's right to inheritance, has been established, insofar as the manumitted slave had no surviving kin, by virtue of his act of generosity (*in'ām*) to the manumitted slave (by the act of manumission). Therefore compensation for the act of generosity requires repayment (*mujāzāh*) but that is not relevant to the lower *mawlā*. Clearly the son (of the manumitted slave) has the right to be the successor of the father and take his place. On the other hand, the manumitted slave is no way suitable (*ṣāliḥ*) to take the place of the manumitter. It was only the manumitter who performed the act of generosity (of manumission) to the manumitted slave. Therefore, the law of Islām compensates him by making him have rights with regard to (the inheritance) from the lower *mawlā*. Thus, the difference between them is clear".¹⁰⁹

ii. The Institution of *Walā' al-Mu'ākhāh* or *Walā' al-Muwālāh*

Clearly the foundling could not be treated in legal terms as a freed slave

¹⁰⁸ Al-Dārimī, *Sunan al-Dārimī*, vol. II, pp. 243-244, al-Sijistānī, *Sunan Abū Da'wūd*, vol. II, p. 123, al-Tirmidhī, *Sunan al-Tirmidhī*, vol. II, p. 142, al-Suyūṭī, *al-Jāmi' al-Ṣaḡhīr*, vol. I, p. 580, al-Tibrizī, *Mishkāt al-Maṣābīḥ*, vol. II, p. 148, al-Qurṭubī, *Tafsīr al-Qurṭubī*, vol. V, p. 166, al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, p. 82. According to al-Qurṭubī, the text says, '*mawlā al-qawm minhum*'- the patron of a clan acts on behalf of themselves. [see al-Qurṭubī, *Tafsīr al-Qurṭubī*, vol. V, p. 167.] Al-Kāsānī reveals a similar text except an additional word was put at the beginning of the text. It says, '*inna mawlā al-qawm minhum*'. [al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. IV, p. 162.] According to Ibn Qudāmah, this *ḥadīth* is regarded as *ṣaḥīḥ*. [see Ibn Qudāmah, *al-Mughnī*, vol. VI, p. 348, al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. IV, p. 171, cf; al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VIII, p. 405.

¹⁰⁹ See al-Qurṭubī, *Tafsīr al-Qurṭubī*, vol. V, pp. 166-167.

as he/she had already been declared free.¹¹⁰ Therefore walā' al-^citq was inappropriate. The jurists needed to find another institution to cover the problems arising out of a lack of a known nasab. When the Emigrants went to Medina, there was a problem about their legal position there, particularly with regard to bloodwit. This problem is partially solved by the Constitution of Medina where the Emigrants are treated as a clan and are responsible as a group for the diyyah incurred by any of their tribemen.¹¹¹ In addition the Prophet introduced the brothering of individual Emigrants with individual Anṣār.¹¹² This involved mutual responsibility of bloodwit and mutual inheritance as well as the individuals concerned taking up the responsibilities of the other in the event of the death of one of them.¹¹³ This institution was termed by jurists as walā' al-mu'ākhāh (the

¹¹⁰Cf; chapter 3, pp. 82-84 .

¹¹¹W. Montgomery Watt, *Muhammad Prophet and Statesman*, p. 94. According to al-Maqrīzī the reports are as follows; (i) 'The Prophet made brotherhood among the group of muhājir and anṣār eight months after migration. At the beginning of Islām, through this brotherhood, both groups, i.e. muhājir and anṣār were allowed to inherit each other and has made it prioritise than their own kinship (qarābah). It is reported that each group comprising forty-five or fifty person until there was not a single muhājir unless he must have been made brotherhood with an anṣār,' (ii) Ibn al-Jawzī quoted as saying; 'I have calculated the total number of individuals who took part in brotherhood was one hundred eighty-six' as mentioned in *Kitāb al-Talqīh* i.e. *Talqīh Fuhūm ahl al-Athar*. The brotherhood took place five months after migration. Other sources say, eight months. However, inheritance through brotherhood has been revoked.' [al-Maqrīzī, *Imtā' al-Asmā'*, vol. I, p. 50.]

¹¹²Al-Ṭabarī, *Tafsīr al-Ṭabarī*, vol. pp. 89-90, cf; al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, vol. III, p. 94, cf; al-Zamaksharī, *Tafsīr al-Kashshāf*, vol. III, p. 524, cf; al-Qurṭubī, *Tafsīr al-Qurṭubī*, vol XIII, p. 124, cf; M.V. Merchant, *A Book of Qur'ānic Laws*, p. 196.

¹¹³Ibn Qudāmah, *al-Mughnī*, vol. VII, p. 786, al-Sarakhsī, *al-Mabsūt*, vol. VIII, p. 81, Neil B.E. Baillie, *A Digest of Moohummadan Law*, pp. 389-390, F.A. Klein, *The Religion of Islām*, p. 217, cf; Charles Hamilton, *The Hedaya*, bk. xxxiii, p. 513, cf; al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol. IV, p. 159, cf; Subḥī Maḥmaṣānī, *Turāth al-Khulafā'*, p. 397, al-Qurṭubī, *Tafsīr al-Qurṭubī*, vol. V, p. 168, cf; al-Ṭabarī, *Tafsīr al-Ṭabarī*, vol. VIII, p. 275, cf; al-Zamaksharī, *Tafsīr al-Kashshāf*, vol. I, p. 505. cf; Patricia Crone, see v. 'mawlā' in *El*², vol VI, p. 876.

walā' of mutual assistance).¹¹⁴ According to the Qur'anic commentators, a similar institution existed in pre-Islamic times the two parties made a contract through swearing an oath saying, "My blood is your blood, I defend you, you defend me, my blood revenge is your blood revenge, my war is your war, my peace is your peace, I inherit from you, you inherit from me, you reclaim from me, I reclaim from you, you commit crime involving bloodwit, I will be liable for the payment of bloodwit".¹¹⁵ According to the Ḥanafīs, one of the reasons for which the Arabs acted in support for each other was on the basis of al-hilf and al-muḥālafah.¹¹⁶ The specific walā' al-mu'ākhāh was abolished by the Qur'anic verse al-Aḥzāb:6 which says:

'And the owners of kinship are closer one to another in the ordinance of Allāh than (other) believers and the Emigrants except that ye should do kindness to your awliyā'. This is written in the book of nature.'

Thus, relationship by kin took over all the responsibilities involved in the walā' al-mu'ākhāh including bloodwit and inheritance. These now had to rely upon nasab. As far as the Mālikīs, Shāfi'īs and Ḥanbalīs were concerned, the

¹¹⁴Ibn Qudāmah, al-Mughnī, vol. VII, p. 786, al-Sarakhsī, al-Mabsūt, vol. VIII, p. 81, Neil B.E. Baillie, A Digest of Moohummadan Law, pp. 389-390, F.A. Klein, The Religion of Islām, p. 217, cf; Charles Hamilton, The Hedaya, bk. xxxiii, p. 513, cf; al-Kāsānī, Badā'ī' al-Ṣanā'ī', vol. IV, p. 159, cf; Subḥī Maḥmaṣānī, Turāth al-Khulafā', p. 397, cf; Patricia Crone see v. 'mawlā' in *Et*², vol VI, p. 876.

¹¹⁵Al-Qurṭubī, Tafsīr al-Qurṭubī, vol. V, p. 168, cf; al-Ṭabarī, Tafsīr al-Ṭabarī, vol. VIII, p. 275, cf; al-Zamakhsharī, Tafsīr al-Kashshāf, vol. I, p. 505.

¹¹⁶Al-Sarakhsī, al-Mabsūt, vol. VIII, p. 82, cf; al-Qurṭubī, Tafsīr al-Qurṭubī, vol. V, p. 167, cf; al-Kāsānī, Badā'ī' al-Ṣanā'ī', vol. IV, p. 162, cf; Ibn Qudāmah, al-Mughnī, vol. VI, p. 348.

ending of the walā' al-mu'ākhāh also brought about the end of walā' al-muwālāh. For them, it was no longer valid for two men to make a contract ('*aqd*) of mutual assistance involving the legal functions of walā' al-muwālāh including mutual payment of bloodwit and inheritance.¹¹⁷

However, according to the Ḥanafī jurists, the contract of mutual friendship (walā' al-muwālāh) is still valid.¹¹⁸ If one person says to another, 'you are my mawlā and shall be my successor when I am dead and shall pay for me any bloodwit to which I may become liable', and if the other party says, 'I accept', then the contract would be regarded as valid.¹¹⁹ It must be stressed that according to the Ḥanafīs, the basis of establishing relationship of walā' al-muwālāh is the contract itself ('*aqd*, i.e. *ījāb wa qabūl*).¹²⁰ The Ḥanafīs reinforce

¹¹⁷Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 271, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 278-279, al-Zamakhsharī, *al-Kashshāf*, vol. I, p. 504-505, cf; al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. IV, p. 170, cf; Ibn Qudāmah, *al-Mughnī*, vol. VII, p. 786, al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, p. 294.

¹¹⁸Ibn Qudāmah, *al-Mughnī*, vol. VII, p. 786, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 278, cf; al-Sarakhsī, *al-Mabsūt*, vol. VIII, p. 82, cf; al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. IV, p. 159 and p. 170, cf; Patricia Crone, *Roman Provincial and Islamic Law*, p. 36, Ibn Qudāmah, *al-Mughnī*, vol. VII, p. 786, Neil B.E. Baillie, *A Digest of Moohummadan Law*, pp. 389-390, F.A. Klein, *The Religion of Islām*, p. 217, cf; Charles Hamilton, *The Hedaya*, bk. xxxiii, p. 513, cf; Subḥī Maḥmaṣṣānī, *Turāth al-Khulafā'*, p. 397. According to the Hanafites, a person who became Muslim under a man when both of them made a contract of mutual amity (*ta'āqadā*) in matter involving inheritance and liability of bloodwit, the contract they made would be regarded as valid. [see al-Zamakhsharī, *al-Kashshāf*, vol. I, p. 504-505.]

¹¹⁹Al-Sarakhsī, *al-Mabsūt*, vol. VIII, p. 82, Baillie, *A Digest of Moohummadan Law*, pp. 389-390. cf; Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 278, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 252, cf; Sir Roland Knyvet Wilson, *A Digest Anglo-Muhammadian Law*, p. 216, al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. IV, p. 170.

¹²⁰Al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. IV, pp. 170-171. It is worth mentioning in this connection, according to the Ḥanafīs, there are certain features required in the contract ('*aqd*) as follows; (i) the one who accept the contract (*mawlā al-lā*) must be responsible for the payment of bloodwit ('*aql al-*

the validity of *walā' al-muwālāh* through the Qur'ānic verses and deductions based on them.

(i) the Qur'anic verse al-Nisā':33:

'To (benefit) every one, We have appointed heirs (mawālī) to property left by parents and relatives, to those also, to whom your right hand was pledged, give their due portion (naṣībahum), for truly God is witness to all things'.

The Ḥanafī al-Kāsānī is quoted as saying that the word *'naṣīb'* in this context refers to inheritance (*al-mīrāth*). This is because, the word *'naṣīb'* in this verse is being attached to those who have sworn alliance.¹²¹

The commentators of the Holy Qur'ān like al-Ṭabarī, al-Qurṭubī and al-

ʿāqid). Thus, the contract in *walā' al-muwālāh* be regarded as invalid if there was no agreement of responsibility for paying bloodwit; or both, the first and the second party (*ʿāqid*) must be sane in mind (*ʿāqil*) (ii) the age of majority (*bulūgh*). This provision which validates the contract. If a *kāfir* child who becomes a Muslim under a man and then makes a contract of *walā' al-muwālāh* with that man, although he has attained the age of puberty, the contract could not be regarded as valid even if the child's father who is *kāfir* allows the contract. This is because although in normal circumstances, a contract made by a child who has not attained the age of puberty depends on permission of the father, but as far as in this case is concerned, the child's father who was a *kāfir* would have no authority (*wilāyah*) towards his Muslim child. Thus, whether permission from the child's father was sought or not, it would have no effect. The same rule applies to all contracts made by a minor even though with the permission of the father. If the second party was a sane minor, the contract would be regarded as valid subject to permission of the father or the legal guardian (*waṣī*). If the father or the legal guardian (*waṣī*) gives permission, the contract would take place. Thus, the acceptance (*qabūl*) of the minor would be regarded as acceptable in all kinds of contract but the father's permission in this context is immaterial. In contrast, if a child who has attained the age of puberty accepts the contract, i.e. the *mawlā ʿalā*, his acceptance which depends on permission of father or child's legal guardian (*waṣī*), the contract be regarded as valid because in this kind of contract if the child accepts, the acceptance (*qabūl*) is regarded as valid not only in this case but in all kinds of contract so long as there is permission from father or legal guardian.

¹²¹ Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, vol. IV, p. 170.

Zamakhsharī agree with the Ḥanafīs' view in maintaining that the one who has sworn alliance (*al-ḥalīf*) would be allowed to receive a due portion of the legacy, i.e. one-sixth of the property, from the second party, the remaining property should be divided among the heirs.¹²² According to the Ḥanafīs, there is a right of inheritance to those who have sworn alliance when it has been set out in a legacy. They maintain that 'those who have sworn an alliance' will be the *mawālī* as long as there is no relation of kin (*dhū raḥm*).¹²³ According to the Ḥanafīs, the meaning of ... give their due portion (*naṣībahum*)... in verse 4:33 refers to *walā' al-muwālāh* because it verifies the maxim which says, 'to attain the gaining of advantage as a result of loss' (*taḥqīq muqābilat al-ghanam bi al-gharam*).¹²⁴

Al-Zamakhshārī, while discussing the meaning of the verse 'And unto each We have appointed *mawālī* of that which parents and near kindred leave; and as for those with whom your right hands have made a covenant, give them their due. Lo! Allāh is ever Witness over all things.'... [al-Qur'ān al-Nisā':33]

¹²²Al-Ṭabarī, *Tafsīr al-Ṭabarī*, vol. VIII, p. 275. According to Abū Ja'far al-Ṭabarī, the meaning of 'those who have sworn an alliance' in al-Nisā' verse 33 refers to *al-ḥalīf* (pl. *al-ḥulafā'*). This is because it is known to most *ahl al-'ilm* in the days of *ayyām al-'arab* the contract of oath would be in the form of swearing, making pact and promising. [al-Ṭabarī, *Tafsīr al-Ṭabarī*, vol. VIII, p. 281], cf; al-Zamakhsharī, *Tafsīr al-Kashshāf*, vol. I, p. 504, cf; al-Qurṭubī, *Tafsīr al-Qurṭubī*, vol. V, p. 166.

¹²³Al-Kāsānī, *Badā'ī'c al-Ṣanā'ī'c*, vol. IV, p. 170.

¹²⁴Al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, p. 82. Al-Kāsānī is quoted as saying that *walā' al-'atāqah* is stronger than *walā' al-muwālāh* because *walā' al-muwālāh* is capable of being nullified but *walā' al-'atāqah* is not. As such, there is no possibility of cancelling the stronger (*aqwā'*) i.e. *walā' al-'atāqah* because of the weaker (*aḍ'af*) i.e. *walā' al-muwālāh*. [see al-Kāsānī, *Badā'ī'c al-Ṣanā'ī'c*, vol. IV, p. 171.]

says:

'The verse contains the meaning of mawālī in this context to those with whom you have made an oath (mawālī al-muwālāh)'.

He seems to regard the latter as the equivalent of ḥalīf which he calls mawālī al-muwālāh.¹²⁵ Al-Zamakhsharī further say:

'The mawālī made the following oath to each other: 'my blood is your blood, my destruction is your destruction, my revenge is your revenge, my war is your war, my peace is your peace, you inherit from me, I inherit from you, if you demand something from me, I demand something from you, you are responsible for the payment of bloodwit on my behalf, I am responsible for the payment of bloodwit on your behalf. The ally (ḥalīf) [i.e. the first party] would be entitled a sixth of the inheritance from the second party ḥalīf (and vice versa)'.¹²⁶

Al-Zuhaylī maintains:

'The mawālā al-muwālāh may operate when both parties are of unknown nasab or the nasab of the first party is known and the second party is unknown. There are two kinds. The first kind refers to both parties whose nasab is unknown where both parties will be responsible for the payment of bloodwit or both parties would be allowed to inherit from each other, in case of one party dying before the other. Thus, both parties become mawālā al-muwālāh and are allowed to inherit from each other. The second kind refers to a contract made by two parties, the nasab of the first party is known but the nasab of the second party is unknown. The first party will be responsible for the payment of the bloodwit and the first party is allowed to inherit from the second party if the latter dies. The second kind of mawālā al-muwālāh is acceptable as it is regarded as

¹²⁵Al-Zamakhsharī, *Tafsīr al-Kashshāf*, vol. I, p. 504.

¹²⁶Al-Zamakhsharī, *Tafsīr al-Kashshāf*, vol. I, p. 504.

walā' (*qābil li al-walā'*), i.e. the uppermost patron to a person of unknown nasab. Thus, according to him, the first party is allowed to inherit from the lower client (*al-adnā*) i.e. the second party because he is regarded as the seeker of walā' (*tālib al-muwālāh*).¹²⁷

On the other hand, as already stated, the majority including Mālik, al-Shāfi'ī and Aḥmad Ibn Ḥanbal, walā' al-muwālāh is no longer valid and therefore has no connection with inheritance or liability of bloodwit (*diyyah*).¹²⁸ According to the Ḥanbalīs, this is because, as stated earlier, a person who is responsible to pay one's bloodwit or who is entitled to inheritance would only be established if such a person has an agnatical relationship (*ʿaṣabah*), similar to guardianship in marriage, that is a person who acts as guardian in marriage should have agnatical relationship with the one who makes a contractual marriage. In this circumstance, the mawlā aḥlā will not be responsible to pay bloodwit for the mawlā adnā or right of inheritance from him.¹²⁹ Mālik is quoted as saying that when a man makes a contractual clientage (*walā' al-muwālāh*) with someone other than his relative (*ʿashīrah*), the payment of bloodwit would be under the responsibility of the clan (*qawm*) to whom that man is affiliated.¹³⁰

¹²⁷See al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VIII, pp. 403-404, cf; Neil B.E. Baillie, *A Digest of Moohummadan Law*, pp. 389-390.

¹²⁸Al-Zamakhsharī, *al-Kashshāf*, vol. I, p. 504-505, cf; al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. IV, p. 170, cf; Ibn Qudāmah, *al-Mughnī*, vol. VII, p. 786, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 278-279, al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, p. 294.

¹²⁹Ibn Qudāmah, *al-Mughnī*, vol. VII, p. 786.

¹³⁰Ibn Qudāmah, *al-Mughnī*, vol. VII, p. 786.

This view was said to be the view of Zayd b. Thābit.¹³¹

Thus, according to the majority, the effect of the relationship in walā' al-muwālāh does not entitle the mawlā a'clā to inherit from the mawlā adnā. This reasoning is also justified by them on the basis of the ḥadīth which says 'innamā al-walā' li-man a'c'atqā' which, they say, implies that only the mu'ctiq was allowed to inherit from the freed slave (a'atīq).¹³² As far as most of the Ḥanafīs are concerned, it seems that it may have been possible for them to have used the institution of walā' al-muwālāh for the foundling. If they did, it would have been in terms of the authorities making a contract with the first party, i.e. mawlā a'clā, on behalf of the foundling. This would seem a satisfactory way of interpreting the Tradition from Caliph 'Umar when he assigned the walā' of the foundling to the finder.¹³³ However, the jurists of the other schools of law, basing

¹³¹ Al-Zamakhsharī, al-Kashshāf, vol. I, p. 504-505, cf; al-Kāsānī, Badā'ī'c al-Ṣanā'ī'c, vol. IV, p. 170, cf; Ibn Qudāmāh, al-Mughnī wa al-Sharḥ al-Kabīr, vol. VII, p. 278-279, al-Bayhaqī, al-Sunan al-Kubrā, vol. X, p. 294.

¹³² Aḥmad al-Ṣāwī, Bulghat al-Sālik, vol. II, p. 327.

¹³³ The text of the ḥadīth says, 'al-laqīt ḥurr wa laka walā'uḥu walanā nafaqatuhu'. [see for example, al-Zurqānī, Sharḥ al-Zurqānī, vol. IV, p. 18, al-Bayhaqī, al-Sunan al-Kubrā, vol. X, p. 298, Ibn Qudāmāh, al-Mughnī, vol. V, p. 686, al-Sarakhsī, al-Mabsūt, vol. X, p. 210, al-Kāsānī, Badā'ī'c al-Ṣanā'ī'c, vol. IV, p. 171, Ibn Qudāmāh, al-Mughnī wa al-Sharḥ al-Kabīr, vol. VII, p. 279, cf; Ibn Rushd, Bidāyat al-Mujtahid, vol. II, p. 232.] Al-Turkumānī, agree with the Ḥanafīs that when a foundling swears alliance of contract with someone through walā' al-muwālāh, his walā' with him should be regarded as established. [al-Turkumānī, al-Jawhar al-Naqī, printed in the margin of al-Bayhaqī, al-Sunan al-Kubrā, vol. X, pp. 298-299.] According to the Ḥanafites, the mawlā of the Muslim community is the basis that the nasab of the foundling belongs to the bayt al-māl. [al-Sarakhsī, al-Mabsūt, vol. VIII, p. 114, cf; Ibn Rushd, Bidāyat al-Mujtahid, vol. II, p. 232.] Thus, according to the Ḥanafīs, it is permissible for a foundling who makes a contract with someone after he/she has been overtaken (idrāk) by the finder or another person where the walā' of the bayt al-māl has not been ascertained because the foundling would be allowed to make contract with anybody he/she pleases. However, in the case of the foundling has not made any muwālāh contract but he commits any crime, the inheritance of the foundling should be handed to bayt al-māl and the bayt al-māl will still be

themselves on a very narrow understanding of the prophetic tradition *al-walā' li-man a^ctaqa* (the *walā'* belongs to the one who gives freedom [to a slave]), have had to reject this. They are forced to understand the meaning of *walā'* in this Tradition as maintenance and upbringing.¹³⁴ Nonetheless, it should be pointed out that the Ḥanafī school was the school of law followed by the authorities. Therefore, it seems likely that this practice was actually carried out although there seems to be no historical evidence to support either group.

iii. The *Walā'* of Converts

According to the Ḥanafīs, the *walā'* between a convert to Islām and the person through whom he became a Muslim is valid. They support this with a *ḥadīth* of the Prophet. It is reported that Tamīm al-Dāri once asked the Prophet whether a person who had become a Muslim through another Muslim could be regarded as a relative in terms of the relationship of patron and client (*walā'*). In reply to this question, the Prophet was reported not to have opposed the relationship, saying that the person who had helped that man to become a Muslim would be regarded as the best person to take charge of his affairs of life

reponsible to pay bloodwit. The same rule would apply to a person of *ahl al-ḥarb* who becomes a Muslim, he would be allowed to make *muwālah* contract with someone he pleases. Thus, if he commits any crime, the *bayt al-māl* should be responsible to pay bloodwit. [Ibn al-Humām *Sharḥ Fath al-Qadīr*, vol. IV, p. 117.] This is because, according to the Ḥanafīs, the original rule in this context states 'to attain the gaining of advantage as a result of loss'. [The original text says; 'li 'anna al-ghanam muqābil bi al-gharam'. See for example, al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 210.]

¹³⁴ Al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 213, cf; Ibn Qudāmah, *al-Mughnī*, vol. V, p. 685.

and death.¹³⁵ According to the Ḥanafī jurists, the right of the patron over the affairs of a person who has become a Muslim was that he would be held responsible for the payment of bloodwit (*diyah*) when the convert commits any crime involving bloodwit.¹³⁶ The relationship stemming from walā' al-muwalāh would give the right of the patron (*mawlā*) after the death of the convert (*client*) is that the patron, i.e the first party could be allowed to inherit from the client, i.e. the second party if the client dies leaving no heir (*wārith*), whether agnate (*ʿaṣabah*) or kin (*dhū raḥm*).¹³⁷

As we mentioned earlier, the most important element in walā' al-muwalāh, according to the Ḥanafīs, is the contract (*ʿaqd*) itself.¹³⁸ Thus, the Ḥanafīs hold that, when a person becomes a Muslim through the influence of a Muslim, the latter becomes his *mawlā* and will be allowed to inherit from him

¹³⁵Al-Sijistānī, *Sunan Abū Da'ūd*, vol. III, p. 127, al-ṭirmidhī, *Sunan al-Tirmidhī*, vol. IV, pp. 37-39, cf; Ibn Qudāmah, *al-Mughnī*, vol. VI, p. 380, cf; Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 278, Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 272, al-Sarakhsī, *al-Mabsūṭ*, vol. VII, p. 91. The text says, 'man aslama ʿalā yadayhi rajul fa-lahu walā'uhu'.]

¹³⁶Al-Kāsānī, *Badā'ī al-Ṣanā'ī*, vol. IV, p. 170, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. X, p. 213 and vol. VII, p. 91, cf; al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VIII, p. 404, cf; Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 278, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 272.

¹³⁷Al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VIII, p. 404, cf; al-Kāsānī, *Badā'ī al-Ṣanā'ī*, vol. IV, p. 170, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. VII, p. 91 and vol. X, p. 213, cf; Ibn Qudāmah, *al-Mughnī*, vol. VI, p. 380, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 278, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 272.

¹³⁸Al-Kāsānī, *Badā'ī al-Ṣanā'ī*, vol. IV, pp. 170-171.

when he dies and would be responsible for the payment of bloodwit.¹³⁹ This is whether the *mawlā*'s acceptance in the contract was directed to the person who had become Muslim under him or to another person. So long as the right of inheritance and responsibility for the payment of bloodwit were mentioned in the contract, the contract should be regarded as valid.¹⁴⁰ In the case of a person becoming a Muslim under another person without making any contract with him but making the contract with some other Muslim, the one who made the contract becomes the *mawlā adnā* to the one he made the contract with. This was the view of the majority. Although, 'Aṭā' holds that the person should become the *mawlā adnā* to the one who made him as a Muslim. The majority base this on the same Qurānic verse al-Nisā' (4):33 ... 'and as for those with whom your right hands have made a covenant, give them their due portion (*naṣībahum*)' which implies that the *walā'* would belong to the one who makes a contract ('āqid).¹⁴¹

¹³⁹Ibn Qudāmah, *al-Mughnī*, vol. VII, p. 786, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 278, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, pp. 81-82 and vol. VII, p. 91, cf; al-Kāsānī, *Badā'ī'c al-Ṣanā'ī'c*, vol. IV, pp. 159-170, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 272, cf; Patricia Crone, *Roman Provincial and Islamic Law*, p. 36, Neil B.E. Baillie, *A Digest of Moohummadan Law*, pp. 389-390, F.A. Klein, *The Religion of Islām*, p. 217, cf; Charles Hamilton, *The Hedaya*, bk. xxxiii, p. 513, cf; Subḥī Maḥmaṣṣānī, *Turāth al-Khulafā'*, p. 397.. According to the Hanafites, a person who became Muslim under a man when both of them made a contract of mutual amity (*ta'āqadā*) in matter involving inheritance and liability of bloodwit, the contract they made would be regarded as valid. [see al-Zamakhsharī, *al-Kashshāf*, vol. I, p. 504-505.]

¹⁴⁰Ibn Qudāmah, *al-Mughnī*, vol. VII, p. 786, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 278, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, pp. 81-82, cf; al-Kāsānī, *Badā'ī'c al-Ṣanā'ī'c*, vol. IV, pp. 159-170, cf; Patricia Crone, *Roman Provincial and Islamic Law*, p. 36, Ibn Qudāmah, *al-Mughnī*, vol. VII, p. 786, Neil B.E. Baillie, *A Digest of Moohummadan Law*, pp. 389-390, F.A. Klein, *The Religion of Islām*, p. 217, cf; Charles Hamilton, *The Hedaya*, bk. xxxiii, p. 513, cf; Subḥī Maḥmaṣṣānī, *Turāth al-Khulafā'*, p. 397.. According to the Hanafīs, a person who became Muslim under a man when both of them made a contract of mutual amity (*ta'āqadā*) in matter involving inheritance and liability of bloodwit, the contract they made would be regarded as valid. [see al-Zamakhsharī, *al-Kashshāf*, vol. I, p. 504-505.]

¹⁴¹Al-Kāsānī, *Badā'ī'c al-Ṣanā'ī'c*, vol. IV, pp. 170-171.

Furthermore, the Companions of the Prophet and his Followers have not stated the establishment of the walā' was because of becoming a Muslim. Many people at the time of the Prophet had embraced the Islamic religion. The Companions and the Followers of the Prophet did not state that someone who had become a Muslim through a Muslim should not to be allowed to make a contract of walā' with someone other than the one who influenced him to become a Muslim. This establishes that the issue of becoming Muslim through a Muslim was not the reason for establishing that the walā' belonged to the person responsible for him becoming a Muslim but rather it was the ‘aqqd, i.e. the contract, which made the walā' belong to that person. Thus, if there was no contract, no inheritance or bloodwit would take place.¹⁴²

On the other hand, many Muslim jurists including al-Ḥasan al-Baṣrī, al-Sha‘bī, al-Thawrī, Mālik and al-Shāfi‘ī are reported to have maintained that the walā' of a person who became a Muslim through a Muslim would not belong to that other Muslim but it would belong to bayt al-māl.¹⁴³ As such, the earlier Muslim would not be allowed to inherit from the Muslim convert.¹⁴⁴ Ibn al-

¹⁴²Al-Kāsānī, *Badā‘i‘ al-Ṣanā‘i‘*, vol. IV, pp. 170.

¹⁴³Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 279, al-Shāfi‘ī, *al-Umm*, vol. IV, p. 74, al-Khaṭīb, *al-Iqnā‘*, p. 647, al-Khaṭīb, *al-Iqnā‘* printed together with al-Bijirmī, *Bijirmī ‘alā al-Khaṭīb*, vol. IV, p. 642, al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 365. Thus, according to the Shāfi‘ites, the wealth left by the convert should be handed over to the bayt al-māl.

¹⁴⁴Ibn Qudāmah, *al-Mughnī*, vol. VI, p. 380, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 278, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 272, cf; al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, p. 209, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. VII, p. 91, al-Shāfi‘ī, *al-Umm*, vol. IV, p. 74, cf; al-Shirāzī, *al-Muḥadhdhab*, vol. II, p. 21, cf; al-Khaṭīb, *al-Iqnā‘*, p. 647 and al-Khaṭīb, *al-Iqnā‘* printed together with al-Bijirmī, *Bijirmī ‘alā al-Khaṭīb*, vol. IV, p. 462, cf; al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 365.

Musayyib is reported to have said:

'The stipulation which establishes the walā' of a person who becomes a Muslim through a Muslim which makes the latter responsible for the payment of bloodwit and be allowed to inherit from the convert was that if that person was not responsible for the payment of the convert's bloodwit he would not be entitled to inherit from him'.¹⁴⁵

However, there is a report that ʿUmar b. al-Khaṭṭāb and ʿUmar b. ʿAbd al-ʿAzīz are said to have held that when a person becomes a Muslim through another Muslim, the relationship of walā' between the two is automatic and does not need an agreement as in the case of walā' al-muwālāh. Thus both are said to have maintained that a Muslim who is responsible for another person becoming a Muslim automatically should be included in those with an entitlement to inherit from him. This view is based on the following hadith: (i) it is related by Rashid b. Saʿd that the Prophet said; *'When a man becomes a Muslim through a person, the latter becomes the patron and would be allowed to inherit from him, the patron has authority over him'*.¹⁴⁶ (ii) ʿĪsā b. Yūnus related from Muʿāwiyah b. Yahyā al-Ṣadfi from al-Qāsim al-Sāmī from Abū ʿAmāmah that the Prophet said: *'Whoever becomes a Muslim through another*

¹⁴⁵Ibn Qudāmah, *al-Mughnī*, vol. VI, p. 380, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 278.

¹⁴⁶The original text says; *'man aslama ʿalā yadayhi rajul fa huwa mawlāh yarithuh wa yaday ʿanhū'*. [see Ibn Qudāmah, *al-Mughnī*, vol. VI, p. 380, Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 278.]

person, the walā' of the former would belong to the latter'.¹⁴⁷

According to the Ḥanafī jurists, the bayt al-māl would be allowed to inherit [property belonging to a person who dies leaving no heir] on the basis of there being a relationship of walā' al-īmān with bayt al-māl. This is because bayt al-māl is for the Muslims. Al-Qur'ān says; 'And the believers, men and women, are (awliyā') one of another ...' [al-Tawbah:71].¹⁴⁸ As far as mawlā is concerned, the mawlā should have been associated with this walā' i.e. a relationship of faith (walā' al-īmān). However, as far as a relationship in walā' al-muwālāh is concerned, this relationship would be more important (awlā) than a relationship with the Muslims [who are of the same faith]. Similarly, a relationship of a patron and client stemming from walā' al-ʿitq would be regarded as more important than a relationship with bayt al-māl because the relationship of walā' al-ʿitq with bayt al-māl is a relationship of patron and client with the Muslims i.e. walā' al-īmān.¹⁴⁹ In addition, when a person who having no known family has not made a contract (ʿaqd) of walā' al-muwālāh with anyone, died, the Muslim community becomes the heir but if his death occurred when the contract of walā' al-muwālāh has been made, he, the ʿāqid [that is the person who made the contract] would have greater right than the Muslim

¹⁴⁷The text says, 'man aslama ʿalā yadayhi rajul fa lahū walā'uhu'. [see Ibn Qudāmah, al-Mughnī, vol. VI, p. 380, Ibn Qudāmah, al-Mughnī wa al-Sharḥ al-Kabīr, vol. VII, p. 278.]

¹⁴⁸Al-Kāsānī, Badāʾiʿ al-Ṣanāʾiʿ, vol. IV, p. 170, cf; al-Sarakhsī, al-Mabsūṭ, vol. VIII, p. 82.

¹⁴⁹Al-Kāsānī, Badāʾiʿ al-Ṣanāʾiʿ, vol. IV, p. 170, cf; al-Sarakhsī, al-Mabsūṭ, vol. VIII, p. 82.

community (*yaqdir ibtāl haqq*).¹⁵⁰

During the Islamic conquest, large groups of the conquered people, whether Arab or non-Arab, became Muslim and are referred to in the historical sources as *mawālī*. Some of these became *mawālī*, not of individual Muslims but of Muslim tribes. In this way, they could participate with their adoptive tribes in the wars. Thus, some of them gained a position on the *dīwān* and received payment (*ʿaṭīyyah*). It now became the responsibility of the whole tribal group, who were receiving payments from the *dīwān*, to act as *ʿāqilah* on their behalf. The Ḥanafī jurists do not mention anything about inheritance but it seems likely that such *mawālī* already had heirs to inherit from them. If there were no heirs, it seems likely that their inheritance went to *bayt al-māl* but the Ḥanafī jurists do not make that clear.¹⁵¹ In fact, the bulk of jurists, excluding the Ḥanafīs, considered that *bayt al-māl* should act as the *ʿāqilah* and also receive any inheritance when there were no heirs.¹⁵² However, the *walāʾ* of the convert in

¹⁵⁰ Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, vol. IV, p. 170, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, p. 82.

¹⁵¹ Al-Ṭaḥāwī, *Mukhtaṣar al-Ṭaḥāwī*, p. 233.

¹⁵² F.H.Ruxton, *Mālikī Law*, p. 369, cf; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, vol. IV, pp. 159-160, cf; Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, pp. 271-278, cf; al-Bahūtī, *Kashshāf al-Qināʿ*, vol. IV, p. 232, cf; Patricia Crone, *Roman Provincial and Islamic Law*, p. 36, cf; al-Ramlī, *Nihāyat al-Muḥtāj*, vol. VIII, pp. 394-395, Ibn Qudāmah, *al-Mughnī*, vol. VI, p. 352 and 376-7, see also al-Maqdisī, *al-ʿUddah Sharḥ al-ʿUmdah*, p. 340-345, cf; al-Bājūrī, *Hashiyat al-Bājūrī*, vol. II, p. 365, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, pp. 271-272, cf; al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VIII, p. 405, cf; Charles Hamilton, *The Hedaya*, bk XXXIII, p. 513, al-Kahlānī, *Subul al-Salām*, vol. III, p. 11 and vol. IV, p. 144, cf; al-Bahūtī, *Kashshāf al-Qināʿ*, vol. IV, p. 232, cf; Subḥī Maḥmaṣṣānī, *Turāth al-Khulafāʾ*, p. 398, cf; al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, p. 292, al-Tirmidhī, *Sunan al-Tirmidhī*, vol. IV, p. 46, al-Darīmī, *Sunan al-Dārimī*, vol. II, p. 398, al-Sijistānī, *Sunan Abū Dāʾūd*, vol. III, p. 127, cf; al-Suyūṭī, *Tanwīr al-Hawālik*, vol. III, p. 9, cf; Mālik b. Anas, *al-Muwattaʾ*, (translated by Aisha Abdurrahman Bewley), p. 324, cf; al-Shīrāzī, *al-Muhadhdhab*, vol. II, p. 20 and 21, cf; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, vol. IV, p. 173, cf; al-Ṭaḥāwī, *Mukhtaṣar*, p. 397, cf; al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, p. 97-98, cf; Aḥmad

general seems to provide us with no more evidence about the walā' of the foundling than was given in walā' al-muwālāh.

iv. The walā' of the foundling

We have already noted the three early Traditions in which 'Umar and the qadī Shurayḥ put the responsibility on bayt al-māl for providing the means for the maintenance of the foundling and assigned the walā' to the finder.¹⁵³ Literally, these Traditions indicate that it is the finder who takes upon him or herself the responsibilities and rights of the mawlā a'ālā in the walā' relationship, i.e. the finder is responsible for paying the bloodwit, arranging marriage if the foundling is a girl, performing the funeral if the foundling dies and also inheriting from him or her if they die without an heir. Although not clearly stated, it seems possible that the Ḥanafīs accepted this form of relationship on the basis of the authorities making a contract of walā' on behalf of the foundling. If this was the case, according to the Ḥanafites' own definition of walā' al-muwālāh, the foundling could make a new walā' with another person at a later stage, i.e. when he or she had grown up. However, the other schools of law could not accept this view on the basis of the Tradition of the Prophet, 'innamā al-walā' li-man a'taqa'

al-Dardīr, *Aqrab al-Masālik*, p. 195, cf; al-Dimashqī, *Kifāyat al-Akhyār*, p. 578-579, cf; al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, pp. 208-209. Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 462, al-Ṭaḥāwī, *Mukhtaṣar al-Ṭaḥāwī*, p. 396, cf; Gertrude H. Stern, *Marriage in Early Islām*, p. 166, al-Nafrāwī, *al-Fawākih al-Dawānī*, vol. II, p. 208.

¹⁵³Cf; p.

(The walā' only belongs to the one who gives freedom). In their views, the relationship which takes place between the finder and the foundling is not a relationship of walā' al-^citq or ni^cmah. In this way the finder could not inherit from the foundling because the foundling is not regarded as the finder's slave (riqq). In the event of the foundling's death, the inheritance left by the foundling would be regarded as unpossessed property which should be handed over to bayt al-māl. This is because one of the roles of bayt al-māl is taking charge of unpossessed property.¹⁵⁴ The finder, in this context could not be allowed to inherit from the foundling.¹⁵⁵

According to the majority of jurists including the Mālikīs and the Shāfi'īs, there is no right of inheritance for anyone who is not related to a person by kinship or marriage (other than bayt al-māl) i.e. without leaving behind anyone who has a right to inheritance. Thus a man who takes responsibility for the foundling whether he is finder or not would be regarded as outside these forms of relationship (ajnabī) and would not be allowed to inherit from the foundling.¹⁵⁶ They base this on the doctrine 'wa walā'uhu li-al-muslimīn'. There are two

¹⁵⁴For example, the Mālikīs are reported to have held that there is no objection to putting non-Muslim's property in the bayt al-māl, like a mu^cāhid (a foreigner living in the Islamic state who is in some sort of treaty relationship with the state), who dies leaving no heirs, the property belonging to him should be handed over to bayt al-māl. [See Aḥmad al-Ṣāwī, Bulghat al-Sālik, vol. II, p. 327.]

¹⁵⁵See for example, Ibn Qudāmah, al-Mughnī, vol. V, p. 687, cf; al-Bahūti, Kashshāf al-Qinā', vol. IV, p. 232, cf; al-Sarakhsī, al-Mabsūṭ, vol. X, p. 213, cf; al-Shīrāzī, al-Muhadhdhab, vol. II, p. 21.

¹⁵⁶Ibn Qudāmah, al-Mughnī wa al-Sharḥ al-Kabīr, vol. VII, p. 279, cf; Aḥmad al-Ṣāwī, Bulghat al-Sālik, vol. II, p. 327, Ibn Qudāmah, al-Mughnī, vol. V, p. 686.

meanings of this doctrine: (i) It means that the wealth left by the foundling should be handed over to bayt al-māl. This is because, the Muslims as a collective entity would be authorised to take charge (*khawwalu*) of the unpossessed property and be allowed to inherit wealth left by the deceased person who had no heir. Regardless of whether the unpossessed property belonged to a foundling or anyone else, it should be handed over to bayt al-māl. (ii) the word 'walā'uhu' in this context means that the wealth left by the foundling would be shared by the Muslim community which has the right of walā' so long as the foundling has no heir.¹⁵⁷

Most Muslim jurists hold that the first ḥadith referring to 'Umar's decision to assign the foundling to the finder that 'Umar allowed the finder to take the foundling because the finder was regarded as a reliable person (*ma'mūn*). In this case all that walā' meant that permission was given to the finder to take charge of the foundling's affairs for the purpose of maintenance and any walā' involved was not meant to give a responsibility for bloodwit and an entitlement of inheritance.¹⁵⁸ They further argue that it could be interpreted that the relationship which is established between the patron and the client is similar to the relationship stemming from consanguinity.¹⁵⁹ They justify this by quoting again the ḥadith of the prophet '*innamā al-walā' li-man aṭṭaqa*'. Thus the walā' of a

¹⁵⁷Ibn Qudāmah, al-Mughnī, vol. V, p. 686, Saḥnūn, al-Mudawwanat al-Kubrā, vol. VIII, p. 368.

¹⁵⁸Ibn Qudāmah, al-Mughnī, vol. V, p. 687.

¹⁵⁹Aḥmad al-Ṣāwī, Bulghat al-Sālik, vol. II, p. 327, cf; Ibn Qudāmah, al-Mughnī, vol. V, p. 686.

child whose nasab was unknown should not also be regarded as established with his unknown parents. As such, the foundling is assumed to be from free parents and therefore the walā' of the foundling would not belong to anybody.¹⁶⁰

Al-Zurqāni says:

*'This matter, i.e. the walā' of the abandoned child (manbūdh) belongs to the Muslim community. The Muslim community would be allowed to inherit from the child and the Muslim community would also be responsible for the bloodwit when the abandoned child commits any crime. According to Mālik, if caliph ʿUmar has said about such a ḥadīth, then the ḥadīth should not be objected. Al-Bāji says, the ḥadīth is regarded as ṣaḥīḥ and there is no doubt. However, the text of the ḥadīth is subject to different interpretation. It would be probable that the finder will be responsible for the upkeep of the child because he, i.e. the finder has a prior right than others'.*¹⁶¹

On this basis, according to the Mālikīs, the walā' of the foundling belongs to the Muslim community, the Muslim community will inherit from him and the Muslim community would be responsible to pay bloodwit when the foundling commits any crime involving bloodwit.¹⁶²

According to the Ḥanafīs, if the bayt al-māl has already been responsible for the payment of bloodwit, the walā' would be under responsibility of the Muslim community and this responsibility could not be transferred to a particular

¹⁶⁰Ibn Qudāmah, al-Mughnī, vol. V, p. 686.

¹⁶¹Al-Zurqānī, Sharḥ al-Zurqānī, vol. IV, pp 18-19.

¹⁶²See Zurqānī, Sharḥ al-Zurqānī, vol. IV, p. 18, Ṣaḥnūn, al-Mudawwanat al-Kubrā, vol. VIII, p 368.

person (*wāḥid bi ʿaynihi*). Thus, in other words, the *walāʾ* should be held responsible to the *bayt al-māl* as the *mawlā ʿlā*. Thus, if he (*mawlā adnā*) dies (and he has no heir), the inheritance goes to the *mawlā ʿlā* or in the case the inheritance automatically goes to *bayt al-māl*.¹⁶³ However the *mawlā adnā* has the right to make a bequest (*waṣiyyah*) when he has no heir. The Ḥanafīs insist that in such a case there is no limitation regarding property left on the basis of bequest. A testator who dies leaving no heirs is allowed to bequeath his whole property because he is the absolute owner of all his property. So he may dispose of it, as he pleases, by giving it away in the form of legacy (*waṣiyyah*).¹⁶⁴

On the question of the *walāʾ* of the foundling, the Muslim jurists other than the Ḥanafīs have created problems for themselves by their stress on the Tradition '*innamā al-walāʾ li-man ʿtaqa*'. We have already seen that they rejected *walāʾ al-muwālāh* and *walāʾ* relationship between the convert and the person through whom he became a Muslim on the basis of this Tradition. They now reject the concept of there being a *walāʾ* relationship between the foundling and the person in whose family the foundling is brought up on the basis of this Tradition. Yet despite their refusal to accept the possibility of such

¹⁶³ Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, vol. IV, p. 171, cf; al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VIII, p. 405, al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, p. 82, cf; al-Taḥāwī, *Mukhtaṣar al-Taḥāwī*, p. 153, cf; Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 278, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 252.

¹⁶⁴ al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, vol. IV, p. 171, cf; Neil B.E. Baillie, *A Digest of Moohummadan Law*, p. 390, al-Sarakhsī, *al-Mabsūṭ*, vol. VIII, p. 82, cf; Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VII, p. 278, cf; Sir Roland Knyvet Wilson, *A Digest Anglo-Muhammadian Law*, p. 216, cf; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 252.

a walā' relationship because of this Tradition, the Mālikīs and the Shāfi'īs construct a walā' relationship between the authorities or bayt al-māl and the foundling.¹⁶⁵ This relationship would also run counter to the Tradition. The state is not responsible for freeing the foundling, so how can the state have the walā' of the foundling? Only the Ḥanabalīs seem to be aware of this contradiction. In effect, they assert ineffective walā' based on the nasab of unknown parents with the state carrying out all the duties of that walā' without actually having the walā'. In modern times, this may seem unimportant. However, in certain Islamic countries, the heirs to people have a significant effect in such matter as bloodwit and the ḥadd punishment so that it is important even today to establish the walā' relationship of the foundling. Presumably, the state will act on behalf of the foundling in such a matter. The Majallah provides a following statement:

'...The state becomes its legitimate heir if it dies without issue, and pays for it if it is guilty of an offence punishable with a fine'.¹⁶⁶

IX.CONCLUSION

The classical jurists in dealing with the problems of a foundling, have shown themselves to be concerned to protect as far as possible the situation of the foundling. They have presumed the foundling to be free and where possible,

¹⁶⁵ al-Kāsānī, Badā'ī' al-Ṣanā'ī', vol. IV, p. 170, cf; al-Sarakhsī, al-Mabsūṭ, vol. VIII, p. 82, Saḥnūn, al-Mudawwanat al-Kubrā, vol. VIII, p 368.

¹⁶⁶ The Majallah article 364.

a Muslim and they have gone out of their way to ensure, within their legal structure, the well-being and good upbringing of the foundling. The procedure which the jurists adopted as regards the relationship between the state and the foster family was that it was the duty of the finder to bring the child to the authorities. Then the authorities would find someone to look after the foundling, usually the finder but not always. The authorities had to ensure that the person would be an appropriate person to look after the foundling. The financing of the maintenance of the child could be taken over by the foster-father and this was recommended, particularly as an act of charity. However, provided the foster father made it clear from the beginning that he would expect to be repaid the costs of the maintenance of the child when that child became an adult, he could reclaim, at the appropriate time, provided they could actually be repaid. However, it was ultimately the state's responsibility to provide the foster father with the means to provide for the child. The state generally seems to have retained the walā' of the child, though this may not have always been the case. Thus, it was the state that would normally be responsible for the bloodwit of the foundling. It would be the state probably in the person of qāḍī who would act as the walī in the marriage of a female foundling. The state would also be entitled to inherit from the foundling, when the foster father receives the walā' of the foundling, the same would apply to him and his family as it did to the state.

This relationship is legally not adoption, the relationship between the foundling and the family is not governed by the same rules as the relationship

would if the foundling had been a legitimate natural child of the family. Thus, the foundling has no rights of inheritance or impediments to marriage. There was one means by which the foster father or any of the foster family, who had grown to love and care for their foster child, could make provision for the child to inherit and that was by waṣiyyah, namely up to a third of the property left could be bequeathed to the foster child so that the assigned shares of inheritance would be somewhat reduced. These classical jurists working on the basic Islamic texts, have laid down a legal system which, with modern improvements, enables the foundling to be brought up in a civilised sensible Islamic way.

CHAPTER FOUR

MEANS BY WHICH THE FOUNDLING COULD ACQUIRE NASAB

I. Adoption not an Option

In pre-Islamic times, adoption was practised. This adoption could take place at any time in a person's life from childhood to adulthood. It could also take place if the adopted person's real parents were alive.¹ The most famous example of an adopted son in pre-Islamic and early Islamic times is Zayd b. Hārithah. He had been a Christian slave of the Prophet's wife Khadijah and she gave him to the Prophet. The Prophet freed him and he thus became the Prophet's *mawlā*.² Later, before revelation came to the Prophet, the Prophet made Zayd his adopted son. At this point, according to pre-Islamic custom, all the taboos and rights which were applied to legitimate natural children could also be applied to the adopted child. Thus, Zayd, who was now known as Zayd b. Muḥammad could not marry any person forbidden to a natural son by virtue of his relationship with his natural father. In addition, Zayd had the right to inherit from the Prophet as a natural son. The Prophet as the *ʿāqilah* of Zayd

¹Fakhr al-Rāzi, *Maṭālib al-Ghayb*, vol. VI, p. 569, Ronald Knyvet Wilson, *A Digest Anglo Mohammadan Law*, pp. 79-80.

²See *Ṣaḥīḥ al-Bukhārī*, vol. VI, p. 290, cf; al-Zamakhsharī, *al-Kashshāf*, vol. II, p. 206, Ibn Kathīr, *Tafsīr Ibn Kathīr*, vol. III, p. 466, al-Jaṣṣāṣ, *Aḥkām al-Qurʾān*, vol. III, p. 436, al-Makhzūmī, *Tafsīr Mujāhid*, vol. II, p. 513, al-Bayḍāwī, *Tafsīr al-Bayḍāwī*, vol. II, p. 238, Ibn Kathīr, *Tafsīr Ibn Kathīr*, vol. III, p. 466, cf; Ibn Hajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, vol. II, p. 401, cf; al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VII, p. 674, cf; Robert Roberts, *The Social Laws of the Qurʾān*, pp. 49-52, cf; al-Tabarī, *Jāmiʿ al-Bayān*, vol. XVIII, p. 119-120, al-Qurṭubī, *Tafsīr al-Qurʾān*, vol. XIV, pp. 118-119, al-Nisābūrī, *Asbāb al-Nuzūl*, p. 201, Bernard Lewis (ed.), *Islam from the Prophet Muhammad to the Capture of Constantinople*, p. 251, Ibn Hajar al-ʿAsqalānī, *al-Iṣṭibāḥ*, vol. I, pp. 563-564, see also al-Qurṭubī, *al-Iṣṭibāḥ*, printed in margin of al-ʿAsqalānī, *al-Iṣṭibāḥ*, vol. I, p. 564, Reuben Levy, *The Social Structure of Islam*, p. 147.

was responsible for paying bloodwit should Zayd have injured or killed anyone. In actual fact, this last provision also applies to the *mawlā*.³

In Medina, a revelation came which abolished this form of adoption. It was revealed in connection with Zayd's wife Zaynab bint Jahsh whom Zayd wanted to divorce and whom the Prophet wished to marry. However, he could not marry her because of the prohibition of the wives of sons being able to marry the sons' fathers. Zayd was treated in legal terms as a natural son even though he was an adopted son. The first revelation establishes the true parents of Zayd, it says:

'Allāh has not made those whom ye claim (to be your sons) your sons. This is but a saying of your mouth. But Allāh sayeth the truth. 'Proclaim their real parentage. That will be more just in the sight of Allāh. And if ye know not their fathers, then (they are) your brethren in the faith, and your clients (mawālī). And there is no sin for you in the mistakes that ye make unintentionally, but what your heart purpose (that will be a sin for you). Allāh is Forgiving, Merciful'.⁴

From that time Zayd was no longer called Zayd b. Muḥammad but was known by the name of his father, i.e. Zayd b. Ḥārithah. The verse also abolishes adoption as an institution and Zayd returns to being a *mawlā* of the Prophet.⁵

³Cf. chapter 3, pp. 101-106.

⁴Q.33 (al-Aḥzāb):5.

⁵It is reported that in the early days of Islām, the adopted son would be allowed to be affiliated to the adoptive father, where by the revelation of the verse "Call them by (the names of) their fathers, that is juster in the sight of God..." Allāh has ordained to withdraw kinship (*nasab*) to the child's father because that position was as just (*qist*, *ʿadl*) and righteous (*birr*). [Ibn Kathīr, *Tafsīr Ibn Kathīr*, vol. III, p. 466.] It is reported by Muslim, al-Tirmidhī, al-Nasāʾī from Musā b. ʿUqbah, the Arabs in the early days of Islām treat their adopted son (*daʿī*) as their real son in all sorts of way (*wayh*) like the adopted child would be prohibited to marry any children of the adoptive parents and regarded the adopted child as (*maḥārim*). It is reported that Sahlāh bint Suhayl, the wife of Abū Hudhayfah, told the Prophet that she treated Sālim as he real son. When the above revelation came down she asked the Prophet whether she would be

There are other examples of this abolition of adoption in early Islām. Al-Qurtubī recorded that according to Qatādah, al-Miqdād b. ʿAmr was actually known as al-Miqdād b. al-Aswad because al-Aswad b. ʿAbd Yagūth adopted him during *jāhilyyah* times but when the revelation came al-Miqdād himself is reported to have claimed that he was the son of ʿAmr though the Meccans still called him al-Miqdād b. al-Aswad.⁶

The same *sūrah*, i.e. al-Aḥzāb 33:37 also contains a verse which shows the marital prohibitions that were formerly applied to adopted children, no longer existed now that adoption no longer existed. It says: *'...so when Zayd had performed the necessary formality, there may be no sin for believers in respect of wives of their adopted sons, when the latter have performed the necessary formality (of release) from them. The commandment of Allāh must be fulfilled.'*⁷

Thus we can see that Islām has completely ruled out adoption as a means of giving the foundling a *nasab* which would bring him into the family of the person looking after him. As noted in the previous chapter, the foundling's *walā'* belonged to the state or *bayt al-māl* and therefore the foundling could not be the

allowed to treat Sālim as her real son. The Prophet told her, if she fostered him, she and her children would be prohibited from marrying him. The abrogation indicates that God has permitted the wife of the adopted son to be married by the adoptive father. The Prophet was allowed to marry Zaynab bint Jaḥsh, the former wife of Zayd b. Hārithah, the Prophet's adopted son. Thus al-Qur'ān says, *'... so that (henceforth) there may be no sin (ḥaraj) for believers in respect of wives of their adopted son (azwāj aḍ'iyā'ihim) ... (al-Aḥzāb (33):37)*. However, the son of fosterage would be regarded as a real son because the ḥadith of the Prophet says that there is forbidden in foster-relationship that which is forbidden in blood-relationship. [Ibn Kathīr, *Tafsīr Ibn Kathīr*, vol. III, p. 466.]

⁶ Al-Qurtubī, *Tafsīr al-Qurtubī*, vol. XIV, p. 120.

⁷ Q. 33 (al-Aḥzāb):37.

one of the prescribed heirs of the family. However, it should be noted that up to a third of the inheritance could be left to the foundling under the terms waṣiyyah. Nonetheless, it would be appropriate to say that with abolition of adoption, the foundling's position within the family that was looking after him was very much like that of a foster child in Britain today; the Government in terms of Social Services have ultimate authority and responsibility for the foundling. The Islamic attitude to adoption can be summed in the word of the Majallah:

'A man cannot adopt a child whose birth is known, and, if he does so, he is not answerable for its maintenance, nor for the expenses of its custody, nor does this create a prohibition of marriage between the adopted and the adopter, who can marry the repudiated wife of the former. They do not inherit from one another'.⁸

II. Istilhāq or Iqrār as an Alternative to Adoption

We have already seen that in pre-Islamic times children born out of normal wedlock could acquire a paternal nasab by virtue of their mother's assertion that a particular man was the father. This kind of claim was completely forbidden in Islām. The way Islām establishes a family relationship involving the legal claim of natural legitimate parenthood for the abandoned child is the institution of istilhāq or iqrār bi-nasab,⁹ that is the claim by a man that this child

⁸The Majallah article 354.

⁹See the detail of this subject, for example, Futāwā Alumghiri, vol. IV, p.213, al-Nawawī, Minhāj al-Tālibīn printed in the margin of al-Shaykh Sulaymān al-Jamal, Sharḥ al-Minhāj, vol. III, p. 427, see also Y.Linant De Bellefonds, v. 'iqrār' in The Encyclopaedia of Islam, new edition, vol III, pp. 1078-1081, al-Khirshī, Sharḥ al-Mukhtaṣar, vol. VI, p. 86, Ibn Qudāmah, al-Mughnī, vol. V, p. 137, Abū Muḥammad Ibn Ghānīm, Majma' al-Damānāt, p. 364, cf; Charles Hamilton (trans.), The Hedaya, p. 427, Neil B.E.Baillie, A Digest of Moohummudan Law, p. 406, Norman Anderson, Law Reform in the Muslim World, p. 139, al-Shirbīnī al-Khāṭib, Mughnī al-Muḥtāj,

- and the claim can be made from the child's childhood to his adulthood - is his by a legitimate marriage.¹⁰ As long as this claim is possible in terms of age and place,¹¹ and is not disputed or objected to,¹² it will be accepted and the child, or adult, will be regarded as the natural offspring of the claimant, regardless of the actual truth of the claim. However, if the claim is made for a child who has reached the age of discretion or an adult, the adult would have to accept the

vol. III, p. 380, al-Nawawī, *Minhāj al-Ṭalibīn wa 'Umdat al-Muṭṭin*, *op.cit.*, p. 60, al-Nawawī, *Minhāj al-Ṭalibīn*, printed together with Abū Zakariyyā al-Anṣārī, *Matn al-Minhāj*, p. 60, al-Nawawī, *Minhāj et-Ṭalibīn*, translated by E.C. Howard, p. 193, cf; al-Malibārī, *Fath al-Mu'īn*, p. 92, M. Shalabī, *Aḥkām al-Uṣrah*, pp. 694-695, al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VII, p. 691, cf; 'Abd al-'Azīz 'Āmir, *al-Aḥwāl al-Shakhṣiyyah*, pp. 91-92.

¹⁰See for example al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. II, pp. 331-332, cf; *Futāwā Alumghiri*, vol. IV, *op.cit.*, p.153; Neil B.E. Baillie, *A Digest of Moohummudan Law*, p.392, cf; Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 195, al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VII, p. 690, cf; Muḥammad Abū Zahrah, *Family Law*, pp. 152-3; Anderson, *Law Reform in the Muslim World*, pp. 139-40; Fyze A.A.A. *Outlines of Muhammadan Law*, p. 166; Keith Hodgkinson, *Muslim Family Law*, p. 308; Syed Ameer Ali, *Student's Handbook of Mahomedan Law*, p. 78; Faiz Badruddin Tyabji, *Muhammadan Law*, pp. 264-5; David Pearl, *A Textbook on Muslim Personal Law*, p. 90; D.F. Mulla, *Principles of Mahomedan Law*, pp. 477-8; al-Dhahabī, *al-Aḥwāl al-Shakhṣiyyah*, p. 340, M. Shalabī, *Aḥkām al-Uṣrah*, p.697, cf; Nawab A.F.M. Abdur Rahman, *Institutes of Mussalman Law*, p. 190. However, according to J. Schacht, an acknowledgment by a mother of such a child is not privileged. [Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, p. 264.]

¹¹Al-Khirshī, *Sharḥ al-Mukhtaṣar*, vol. VI, pp. 100-101, al-'Adawī, *Hāshiyat al-'Adawī* printed in the margin of al-Khirshī, *Sharḥ al-Mukhtaṣar*, vol. VI, pp. 100-101, vol. VI, p. 101, F.H. Ruxton, *Maliki Law*, p. 207, Ṣāliḥ 'Abd al-Samī' al-Azhārī, *Jawāhir al-Iklīl*, vol. II, p. 138, Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 195, Aḥmad al-Dardīr, *al-Sharḥ al-Saghīr* printed in the margin of Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, p. 195, Ṣāliḥ 'Abd al-Samī' al-Azhārī, *Jawāhir al-Iklīl*, vol. II, p. 138, Muḥammad Fīhr Shaqafah, *Sharḥ al-Aḥkām*, p. 213, cf; al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VII, p. 691, al-Nawawī, *Minhāj et-Ṭalibīn*, translated by E.C. Howard, p. 193, cf; al-Malibārī, *Fath al-Mu'īn*, p. 92, Shaykh Sulaymān al-Jamal, *Hāshiyat al-Jamal 'alā Sharḥ al-Minhāj*, vol. III, p. 427, Abū Zakariyyā al-Anṣārī, *Sharḥ al-Minhāj* printed in the margin of Shaykh Sulaymān al-Jamal, *Hāshiyat al-Jamal 'alā Sharḥ al-Minhāj*, vol. III, p. 427, D.F. Mulla, *Principles of Mahomedan Law*, *op.cit.*, pp. 477-8, Faiz Badruddin Tyabji, *Muhammadan Law - The Personal Law of Muslims*, *op.cit.*, pp. 264-5; Syed Ameer Ali, *Students Handbook of Mahomedan Law*, p. 78; Muḥammad Abū Zahrah, *Family Law*, pp. 152-3; Neil B.E. Baillie, *A Digest of Moohummudan Law*, p. 408; al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VII, p. 691; F.H. Ruxton, *Maliki Law*, p. 207, cf; 'Abd al-'Azīz 'Āmir, *al-Aḥwāl al-Shakhṣiyyah*, pp. 91-92, al-Dhahabī, *al-Aḥwāl al-Shakhṣiyyah*, p. 339; M. Shalabī, *Aḥkām al-Uṣrah*, p.696, Muḥammad Abū Zahrah, *Family Law*, pp. 152-3, Fyze A.A.A. *Outlines of Muhammadan Law*, p. 166, Tanzil ur-Rahman, *A Code of Muslim Personal Law*, vol. I, p. 713, Faiz Badruddin Tyabji, *Muhammadan Law - The Personal Law of Muslims*, pp. 264-265, Robert Roberts, *The Social Laws of the Qur'ān*, p. 51.

¹²See for example Neil B.E. Baillie, *A Digest of Moohummudan Law*, p. 408.

claim.¹³ The *Majallah* says:

'If a man acknowledges as his a child whose birth is unknown, and there is between them a reasonable difference in age, paternity is established by his sole declaration, provided such a declaration was assented by the child if he is the age of good judgement...'.¹⁴

This means that through this process the abandoned child gains all the rights, privileges and duties of a natural son or daughter. In effect, this, could be another form of adoption, particularly if the claim is in fact untrue. The lawyers are only formally concerned with the truth of the claim. Their concern is only whether the claim is possible. If that is the case, they make no objection but traditions go out of their way to warn people against making such a false claim. For example it is narrated that the Prophet Muḥammad said:

'If anyone knowingly claims as a father one who is not his father, paradise is forbidden to him'.¹⁵

In another *ḥadith* the Prophet says:

'Almighty God prohibits whoever intentionally claims him other than his

¹³Neil B.E.Baillie, *A Digest of Moohummadan Law*, p. 408, cf; Muḥammad Abū Zahrah, *Family Law*, pp. 152-3; D.F. Mulla, *Principles of Mahomedan Law*, pp. 477-8; David Pearl, *A Textbook on Muslim Personal Law*, p. 90; Keith Hodgkinson, *Muslim Family Law*, p. 308; Faiz Badruddin Tyabji, *Muḥammadan Law*, pp. 264-5; Fyzee A.A.A. *Outlines of Muhammadan Law*, p. 166.

¹⁴The *Majallah* article 350.

¹⁵Al-Tibrizī, *Mishkāṭ al-Maṣābiḥ*, vol. II, 1961, p. 221; see also James Robson (trans.), *Mishkāṭ al-Maṣābiḥ*, vol. II, 1963, p. 705; al-ʿAsqalānī, *Fatḥ al-Bārī*, vol. XXII, pp. 54-55, al-Ṭabarī, *Tafsīr al-Ṭabarī*, vol. XVIII, p. 120, al-Bayhaqī, *Sunan al-Kubrā*, vol. VII, p. 403, al-Zuhaylī, *al-Fiqh al-Islamī*, vol. VII, p. 674. According to al-Suyūṭī, this ḥadith was reported by Aḥmad in *Musnad*, Bukhārī, Muslim, Abū Daʿwud and Ibn Mājah related by Saʿd and Abū Bakrah. The *ḥadith* is regarded as *ṣaḥīḥ*. [See al-Suyūṭī, *al-Jāmiʿ al-Ṣaḥīḥ*, vol. II, p. 561.]

real father from entering paradise'.¹⁶

In principle, the one major restrictive matter regarding the *istilhāq* of the foundling is that the acknowledgment made by a claimant would be required to be made sincerely (*maḥḍ*) for the benefit to the foundling. This is because, the conjunction (*ittiṣāl*) of the child's *nasab* which takes place between the claimant and the acknowledged child is for the advantage of the child and is comparable to the acknowledgment of property (*māl*).¹⁷ The Shāfi'īs are reported to have held that when a foundling is claimed by a person other than the finder, the *nasab* would be regarded as established and the claimant should be allowed to take the foundling from the finder because the Shāfi'īs assume the claimant would be the father of the foundling who had the right to acknowledge his child. This is because, according to the Shāfi'īs, acknowledgment made by a father is comparable to claim with proof (*bayyinah*).¹⁸

However, it should be noted that there are some occasions when disagreement occurs among Muslim jurists: (i) when the claimant is a *dhimmī*, (ii) when the claimant is a woman and (iii) when there are more than one claimant.

¹⁶ Al-Ṭabarī, *Tafsīr al-Ṭabarī*, vol. xxi, p. 120, see also Abu al-Abbās Ahmad b. Ali bin Hajar al-Makki al-Haythami, *al-Zawājir 'an Iqtirāf al-Kabā'ir*, p.62, cf; al-Qurtubī, *Tafsīr al-Qurtubī*, vol.XIV, p. 121.

¹⁷ Al-Maqdisī, *al-Uddah Sharḥ al-Umdah*, p. 263, cf; Ibn Qudāmah, *al-Mughnī*, *op. cit.*, vol. V, p. 694.

¹⁸ Ibn Qudāmah, *al-Mughnī*, *op. cit.*, vol. V, p. 694, cf; al-Kāsānī, *Badā'ī' al-Ṣanā'ī'*, vol. VIII, p. 39, cf; al-Bājūrī, *Ḥāshiyat al-Bājūrī*, vol. II, p. 61, cf; al-Malibārī, *Fath al-Mu'n*, p. 92, al-Nawawī, *Mihāj al-Ṭālibīn*, (translated by E.C. Howard), p.242.

(i) According to the Shāfi'īs, if the claimant was a dhimmi, i.e. a Christian or a Jew, he had to provide proof (*bayyinah*).¹⁹ Al-Shāfi'ī clearly says in al-Umm:

'If a Christian establishes proof before the Muslim community that such a child is the child of his bed, his acknowledgement of paternity is established and the religion of such a child is similar to the religion of his father'.²⁰

Thus, according to the Shāfi'īs, the istilhāq of a Christian who claimed an abandoned child, be it the finder or another person, is established so long as he could provide bayyinah.²¹ However, according to the Ḥanafīs, the claim of paternity of an abandoned child by either Christian or Jew is established even without bayyinah because the establishment of the child's nasab was based on the assumption that the claimant was the owner of the bed (*firāsh*).²² The Majallah states:

'If either the finder or another claims that the child found is his son, the paternity is established by the mere declaration, even if he is a Christian

¹⁹For the school of Ḥanafī law see for example al-Zayla'ī, Tabayīn al-Haqqā'iq, vol. III, p. 298, Ibn al-Humām, Sharḥ Faṭḥ al-Qadīr, vol. VI, p. 111, cf; Nawab A.F.M Abdur Rahman, Institutes of Mussalman Law, p. 194, al-Ḥaṣḥafī, Sharḥ al-Durr al-Mukhtār, vol. I, p. 490-491, cf; al-Sarakhsī, al-Mabsūṭ, vol. X, p. 211; for the Hanbalīs work see Ibn Qudāmah, al-Mughnī, vol. V, p. 696, Muwaffaq al-Dīn Ibn Qudāmah, Umdat al-Fiqh, p. 56, Ibn Qudāmah, al-Mughnī, *op. cit.*, vol. V, p. 694, al-Maqdisī, al-Uddah Sharḥ al-Umdah, p. 263, cf; al-Kāsānī, Badā'ī al-Ṣanā'ī, vol. VIII, p. 39, cf; al-Bājūrī, Hāshiyat al-Bājūrī, vol. II, p. 61, cf; al-Ramlī, Nihāyat al-Muḥtāj, vol. V, p. 462, for the Mālikīs' work see al-Mawāq, al-Tāj wa al-Iklīl printed in the margin of al-Ḥattāb, Mawāhib al-Jalīl, vol. III, p. 82.

²⁰Al-Shāfi'ī, al-Umm, vol. VI, *op. cit.*, p. 268.

²¹Al-Shāfi'ī, al-Umm, vol. VI, p. 268.

²²Al-Sarakhsī, al-Mabsūṭ, vol. X, p. 217.

or a Jew subject of a Mohammedan power'.²³

(ii) According to the Mālikīs, the *istilhāq* made by a female is only established if her husband accepted that his wife's *istilhāq* was correct. If her husband does not allow her to take the abandoned child, she cannot make *istilhāq*. If she is the finder, she was allowed to replace the child where it was found or replace it in a safer (*ma'mūn*) place. However, if she does not want to replace it where it was found because she has money for providing maintenance of the child, she is allowed to do so. In the case of her husband allowing her to take up the foundling, the maintenance of the child is incumbent on her husband even though his wife has money to support the child because permission to take up the child signifies that the husband is being regarded as the finder.²⁴ Presumably for the child to acquire the father's *nasab*, he, i.e. the father, would have to accept the claim made by his wife. In point of fact, this sort of claim that required the husband's approval would only be made in cases of a foundling and children whose parenthood (*nasab*) was in dispute.²⁵ The *Majallah* says:

*'If a married woman acknowledges a foundling to be hers, her relationship to it is not established unless the husband approves such an acknowledgement by a formal consent, or unless the two women proves that the child was the issue of her union to him and establishes its identity...'*²⁶

²³The *Majallah* article 361.

²⁴Aḥmad al-Ṣāwī, *Bulghat al-Sālik*, vol. II, pp. 326-327.

²⁵Al-Nawawī, *Minhāj al-Ṭālibīn*, p. 74, cf; al-Bijirmī, *Bijirmī 'alā al-Khaṭīb*, vol. III, p. 290.

²⁶The *Majallah* article 363.

In the case of a dhimmi and a Muslim claiming the paternity of a foundling, the Muslim's claim will take precedence over a non-Muslim.²⁷ The Majallah says:

'... If both claimants are of different religion, the Mohammedan will have the priority over the other'.²⁸

(iii) In cases where there is more than one claimant for a foundling, precedence is given by the jurists to the first claimant. As the Majallah says:

'When the paternity of the foundling is claimed by two persons other than the person who found him, the first claimant will have the priority, unless proof the contrary is produced'.²⁹

However, other jurists maintained that physiognomy could be used to determine the correct claimant.

III. Physiognomy (al-qiyāfah) as a Means of Determining Disputes over Paternity

We have already seen that physiognomy or qiyāfah had been used in pre-Islamic times as a means of determining nasab when there were several

²⁷Ibn Qudāmah, al-Mughnī, *op. cit.*, vol. V, p. 696.

²⁸The Majallah article 362.

²⁹The Majallah article 362.

potential fathers.³⁰ However, Islām only allows the possibility of more than one potential father in the case of *wat' shubhah* and claims made for paternity in the case of the foundling. As has already been discussed physiognomy has no effect in the face of the doctrine of *al-walad li-al-firāsh*.³¹ In cases where there was a dispute or doubt about the paternity of a child, according to the majority, physiognomy could be used.³² We have already seen that physiognomy has been used in the case of Usāmah,³³ and Zaynab's slave.³⁴ The ḥadīth about Zaynab's slave clearly establishes that whatever the physiognomist might say, the doctrine of *al-walad li al-firāsh* prevailed over him. In the case of Usāmah the physiognomist affirmation of Zayd being his father merely served to verify an existing situation.³⁵

³⁰Muwaffaq alDīn Ibn Qudāmah, *Umdat al-Fiqh*, p. 108, Ibn Qudāmah, *al-Mughnī*, vol. V, *op.cit.*, p. 706, Ibn Qayyim, *al-Turuq al-Hukmiyyah*, pp. 290-293.

³¹Cf; chapter 1 pp. 12-15.

³²Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, p. 269, Ibn Qayyim, *Zād al-Ma'ād*, vol. IV, pp. 116-119, cf; Ibn Qayyim, *al-Turuq al-Hukmiyyah*, pp.300-301, cf; Reuben Levy, *The Social Structure of Islam*, p. 137, Ḥāji Khalīfah, *Kashf al-Zunūn*, vol. I, pp. 1366-1367, cf; T. Fahd, see v. 'Qiyāfah' in *ET*, p. 235. As far as physiognomy is concerned in this context, there are two branches; (i) *qiyāfat al-bashar* which has the object of disclosing the lines of parentage between the child of an unknown father and his presumed father with a view of legitimization. (ii) *qiyāfat al-athar* i.e. the faculty of minutes observation which the Arab displays, most notably in the course of everyday life. The examination of footprints permits him to find stray animal, a fugitive chief, also path etc; he distinguishes the footprints of a man from those of a woman, those of a young man from those of an old man, those of a white from those of a negro and those of a stranger from those of a local resident. He can tell even the woman is a virgin or not. Shurayh, the famous *qāḍī* was a *qāḍīf*.

³³Mustafā 'Aṭīyyah Mashrafah, *al-Qadā' fi al-Islām*, n.d., pp. 82-83, Ibn Qayyim, *Zād al-Ma'ād*, vol. IV, pp. 116-119; Ibn Qayyim, *al-Turuq al-Hukmiyyah*, p. 295, see also Ibn Qudāmah, *al-Mughnī*, vol. V, p. 697; cf; al-Shāfi'i, *al-Umm*, vol. VI, p. 247, cf; Ibn Ḥajar al-ʿAsqalānī, *Sharḥ Ṣaḥīḥ al-Bukhārī*, vol. XII, p. 57; al-Nasā'i, *Sunan al-Nasā'i*, vol. VI, p. 151, al-Sijistānī, *Sunan Abu Dā'ūd*, vol. I, p. 280, al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, p.262, al-Turkumānī, *al-Jawhar al-Naqī* printed together with al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, pp. 262-265.

³⁴Cf; chapter 1, p.13.

³⁵See Mustafā 'Aṭīyyah Mashrafah, *al-Qadā' fi al-Islām*, n.d., pp. 82-83, Ibn Qayyim, *Zād al-Ma'ād*, vol. IV, pp. 116-119; Ibn Qayyim, *al-Turuq al-Hukmiyyah*, p. 295, see also Ibn Qudāmah, *al-Mughnī*, vol. V, p. 697; cf; al-Shāfi'i, *al-Umm*, vol. VI, p. 247, cf; Ibn Ḥajar al-ʿAsqalānī, *Sharḥ Ṣaḥīḥ al-Bukhārī*, vol. XII,

These cases of doubt or dispute arose out of incidents of waṭ' shubḥah or nikāh fāsid. In the case of waṭ' shubḥah, the use of physiognomy arises from the pregnancy of a woman (i) when two men have had intercourse with her, each believing her to be his wife or (ii) when the woman was the joint slave of two or more masters, who both had intercourse with her, each believing that the other had not had sexual intercourse with her. In this case, in order to determine who is the father, physiognomy should be used. In the case of nikāh fāsid physiognomy is used where a husband repudiates his wife immediately after intercourse with her and she marries without observing the waiting period by error or where a master sells his female slave after intercourse and the purchaser has intercourse with her without observing her period of purification (*istibrā'*).³⁶ The other occasion for the use of physiognomy is where two or more men acknowledged paternity of a child of hitherto unknown descent.³⁷ In this case, physiognomy could be used to determine a foundling's father.³⁸

Apart from the exceptions under the doctrine of al-walad li al-firāsh, Muslim jurists maintain that the person who has been identified by the physiognomist as the real father of a child should be considered such. In the

p. 57; al-Nasā'ī, *Sunan al-Nasā'ī*, vol. VI, p. 151, al-Sijistānī, *Sunan Abu Dā'ūd*, vol. I, p. 280, al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, p. 262, al-Turkumānī, *al-Jawhar al-Naqī* printed together with al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, pp. 262-265.

³⁶Ibn Qayyim, *al-Turuq al-Hukmiyyah*, pp. 288-311, al-Nawawī, *Minḥāj al-Tālibīn*, (translated by E.C.Howard), p. 534, cf; Ibn Qudāmah, *al-Mughnī*, vol. V, *op.cit.*, p. 706.

³⁷Muwaffaq al-Dīn Ibn Qudāmah, *Umdat al-Fiqh*, p. 108, Ibn Qudāmah, *al-Mughnī*, vol. V, *op.cit.*, p. 706, Ibn Qayyim, *al-Turuq al-Hukmiyyah*, pp. 290-293.

³⁸See Ibn Qayyim, *Zād al-Ma'ād*, pp. 116-119, Ibn Qayyim, *al-Turuq al-Hukmiyyah*, pp. 300-301, al-Taḥāwī, *Mukhtaṣar al-Taḥāwī*, p. 358.

case of a physiognomist being unable to decide which a man was the father of a child or the physiognomist has found traces that the child's filiation could be to either of them, the maintenance of the child and his filiation is the responsibility of all the claimants and the child upon his majority has to decide to which of the persons he prefers.³⁹ Ibn al-Qāsim al-Mālikī and Muhammad b. al-Mawāz discussed a case of a woman delivering a baby girl and out of fear that she would be repudiated by the husband, discarding her new born child near the door of the mosque hoping so that somebody might take it up and support it. Then the husband forced the wife to get the child back. But unfortunately when the woman went to get the child, she found another baby girl also abandoned there and she was not sure which child was hers. However, she took one of the two children and her husband claimed the affiliation of the child. His acknowledgement of paternity is not established as it cannot be ascertained that the child taken up by his wife was really his child. In this case, the Mālikīs, like Ṣaḥnūn for example, hold the view that the establishment of the affiliation of the child must be applied through physiognomy. Thus the acknowledgment of paternity on the basis of using physiognomy should be used by examining

³⁹See Ibn Qudāmah, *al-Mughnī*, *op. cit.*, vol. V, p. 703, cf; al-Nawawī, *Minhāj al-Ṭālibīn*, translated by C.E. Howard, pp. 242-243, cf; Muḥammad b. Aḥmad al-Ṣāliḥ, *al-Tifl fi al-Sharī'ah al-Islāmiyyah*, pp. 161-167. Thus, according to Ibn Qayyim, in order to affirm the *nasab* of the child where there is no *firāsh*, the acknowledgement of paternity (*istilhāq*) will take place, but if *istilhāq* cannot be implemented, the mode of resemblance (*shabah*) i.e. physiognomy has to be applied. [Ibn Qayyim, *Al-Turuq al-Hukmiyyah*, *op. cit.*, pp. 292-296.] The requirement of resemblance as a mode of establishing *nasab* should rely upon the confirmation of the physiognomist (*qā'if*) not others, unless the resemblance of such a child is because he/she was born by the woman who has had an illegal sexual relationship with other than her husband and the husband disowns the child by the process of imprecation (*li'ān*), in which case the *nasab* of the child would be disconnected. This is because, the resemblance could only be applied as one of the modes in establishing *nasab* if there is strong reason i.e., *al-firāsh*. It is reported in referring to the case of 'Abd b. Zum'ah, the Prophet Muḥammad did not choose resemblance for there was strong reason of affiliation, i.e., *al-firāsh*. Thus, so long as the union legally valid in Muslim family law, according to Ibn Qayyim, resemblance (*al-shabah*) would be regarded as clear proof (*al-bayyinah*) itself. [Ibn Qayyim, *al-Turuq al-Hukmiyyah*, *op. cit.*, p. 306.]

whether the child has the same features of the father.⁴⁰

On the other hand, the Ḥanafīs hold that physiognomy cannot be applied in this case.⁴¹ They maintain that in the case of such a child being acknowledged by two claimants, the child should be affiliated to both claimants.⁴² This is because physiognomy which merely depends on resemblance of physical features would be regarded as doubtful proof. Any doubtful proof could not be certain.⁴³ Thus, according to the Ḥanafīs, such an acknowledgement of paternity determined by physiognomy could not be regarded as valid. Therefore, when there are two persons who acknowledge paternity of such a child, the child would be allowed to inherit from both claimants and both claimants would also be allowed to inherit from the son as a single father. This view is related by caliph ʿUmar and ʿAli because sonship is indivisible (*lā taḥṭamil al-tajziʿah*).⁴⁴ The Ḥanafīs maintain that the rule of physiognomy which is based solely on resemblance (*shabah*), guessing (*ẓann*) and estimation (*takhmīn*) and taking into account resemblance could occur among those who were unrelated (*ajānib*) but

⁴⁰ Ṣāliḥ ʿAbd al-Samīʿ al-Azhārī, *Lawāḥir al-Iklīl*, vol. II, p. 139.

⁴¹ According to the Ḥanafīs, the child is affiliated to two persons if a woman was repudiated by her husband and after observing her waiting period has married another man but her child is acknowledged by the first and the second husband. This is because the original rule states that physiognomy (*al-qiyāfah*) is not applied even though there is an indication that the woman may have been made pregnant by either of two persons. [See al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. VII, p. 680.]

⁴² See for example Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. VI, p. 396-411; al-Shāfiʿī, *al-Umm*, vol. VI, p. 264; al-Sarakhsī, *al-Mabsūṭ*, vol. XVII, p. 42 and 70 and vol. XXX, p. 46 and 155; al-Shīrāzī, *al-Muhadhdhab*, vol. I, p. 443; *al-Muwattaʿ bi-sharḥ al-Suyūṭī*, vol. II, p. 120; Ibn Ḥajar al-ʿAsqalānī, *Fath al-Bārī*, vol. XII, p. 48; *Muslim bi-Sharḥ al-Nawawī*, vol. X, p. 42; al-Shawkānī, *Nayl al-Awtār*, vol. VI, p. 240, al-Ṭahāwī, *Mukhtaṣar al-Ṭahāwī*, p. 358, Ṣubḥī Maḥmaṣṣānī, *Turāth al-Khulafāʾ*, *op.cit.*, p. 372.

⁴³ Ibn Qudāmah, *al-Mughnī*, vol. V, p. 697.

⁴⁴ Ṣubḥī Maḥmaṣṣānī, *Turāth al-Khulafāʾ*, p. 372, al-Sarakhsī, *al-Mabsūṭ*, vol. V, pp. 156-157, Ibn Rushd, *Bidāyat al-Mujtahid*, vol II, p. 298.

perhaps it may not occur among kin (*aqārib*).⁴⁵ Thus, according to the Ḥanafites, the rule of physiognomy may not always be necessary to determine the child's *nasab*.⁴⁶

In order to confirm the child's *nasab* through the process of physiognomy only one physiognomist is required. However another view holds that the *nasab* of the child is only possible when there are two physiognomists.⁴⁷ However, the latter view would be considered as unacceptable because as far as the case of Usāmah b. Zayd is concerned, Usāmah was confirmed by only one physiognomist.⁴⁸ However, it should be added, as already pointed out, that the use of the physiognomist in the case of Usāmah was merely for public verification and the doctrine of *al-walad li al-firāsh* had already established Usāmah's *nasab*.

The Shāfi'īs argue that a child should not be affiliated to more than one person because in the report from caliph ʿUmar when the physiognomist confirmed that the parentage of such a child could be affiliated to two men, ʿUmar insisted that the physiognomist point to one of them only.⁴⁹ The Ḥanbalīs

⁴⁵See Ibn Qudāmah, *al-Mughnī*, vol. V, pp. 694-697, cf; Ibn Qayyim, *al-Ṭuruq al-Ḥukmiyyah*, p. 289.

⁴⁶See Ibn Qudāmah, *al-Mughnī*, vol. V, pp. 694-697, cf; Ibn Qayyim, *al-Ṭuruq al-Ḥukmiyyah*, p. 289, Subḥī Maḥmaṣṣānī, *Turāth al-Khulafāʾ*, p. 372, al-Sarakhsī, *al-Mabsūṭ*, vol. V, pp. 156-157, Ibn Rushd, *Bidāyat al-Mujtahid*, vol II, p. 298.

⁴⁷Ṣāliḥ ʿAbd al-Samīʿ al-Azhari, *Jawāhir al-Iklīl*, vol. II, p. 139.

⁴⁸Al-Tirmidhī, *Sunan al-Tirmidhī*, vol. IV, p. 48.

⁴⁹See Ibn Qudāmah, *al-Mughnī*, vol. V, p. 701.

hold that the child would be allowed to be affiliated to more than one person. However, some of the followers of the Ḥanbalīs like Ibn Ḥāmid maintained that such a child cannot be affiliated to more than one person. Al-Qādī Abū Yaʿlā, a follower of the Ḥanbalī sect, holds that the child could be affiliated to more than one person but not more than three persons.⁵⁰ A man to whom the physiognomist allots a child has to acknowledge the child's paternity.⁵¹

Muslim scholars stipulate, a physiognomist must have the following characteristics. He must be a male, having attained the age of puberty (*bāligh*), of sane mind (*ʿaql*), free, (*ḥurr*), just (*ʿādil*), irreproachable character, long experience and it must be ascertained that his decision on the child's father is correct. This would be done prior to his investigation of the problem by testing the physiognomist to see if he can detect a person of known parentage whom will be included among a group of ten.⁵²

The Shāfiʿīs and some of the Ḥanbalīs maintain that the physiognomist's confirmation of the affiliation of such a child could not be accepted as valid if the affiliation was made to more than two persons. This would indicate the physiognomist's determination was false and therefore such a child should not

⁵⁰ Muḥammad b. Aḥmad al-Ṣāliḥ, *al-Tiḥḥī fi al-Sharīʿah al-Islāmiyyah*, pp. 161-167.

⁵¹ Reuben Levy, *The Social Structure of Islam*, p. 136, al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, p. 262, al-Turkumānī, *al-Jawhar al-Naqī* printed together with al-Bayhaqī, *al-Sunan al-Kubrā*, vol. X, pp. 262-265.

⁵² See Ibn Qudāmah, *al-Mughnī*, vol. V, p. 699, cf; al-Zamakhsharī, *al-Kashshāf*, vol. IV, p. 240, cf; al-Nawawī, *Minḥāj al-Tālibīn*, translated by C.E. Howard, p. 536.

be affiliated to any one of them.⁵³

If a child has no resemblance to his father, so long as the child's features are of similar appearance to one of his agnates, the father's acknowledgment of paternity is accepted. This is because the principle of physiognomy is the art of discerning the paternity of child from the features of the face. The resemblance in features of the face found in such a child is sometimes not necessarily similar to that of the father. It is very possible that the features of the child's face are similar to those of his grandfather, brother or any other of the agnates.

This has been an analysis of the views of the classical jurists. In the modern period, the role of the physiognomist would be taken over by modern medicine with such thing as DNA and blood tests. This provides more certainty than physiognomy. However, it would still seem that in order to preserve the child's legitimacy the doctrine of *al-walad li-al-firāsh* would still prevail where it was appropriate.

IV. Drawing Lots (*al-qur'ah*)

In the case of failure of other ways of determining the child's paternity - i.e., proof, acknowledgment and physiognomy (*qāfah*) - drawing lots is a last

⁵³ Ibn Qudāmah, *al-Mughnī*, vol. V, p. 764, cf; Muḥammad b. Aḥmad al-Ṣāliḥ, *al-Tifl fi al-Sharī'ah al-Islāmiyyah*, pp. 161-167.

resort to establish the acknowledgement of paternity.

The drawing of lots is [also] applied in the case of claim for mursalah property, the ownership of which cannot be established by factual evidence (qarīnah) nor by a [clear] indication (amārah). The drawing of lots is also applied in the case of paternity which is confirmed only by hidden resemblance by some other jurists.⁵⁴ In an interesting tradition discussed by Ibn Qayyim al-Jawziyyah which is included in the Sunan Abū Dā'ūd and al-Nasā'ī, there is a report of three men all having intercourse with one woman who could conceive, i.e., before her next menstrual period was due. All three claimed the child as their property. Clearly these men must have had joint ownership of the woman during the course of that month. Otherwise the child would have been walad zinā and the men could have made no claim. 'Alī settled the matter by drawing lots for the child, the winner of the child having to pay a third of the child's value (diyāh, i.e. the bloodwit equivalent) to each of the two who were unsuccessful in the lottery.⁵⁵ In the case diyāh is only being used to determine the value of the child so that the alienation of nasab for those who failed to draw the lot may be compensated.

In the case of paternity, it can be said that the intercourse of each man could have brought about the conception of the child, thus each one of them

⁵⁴See Ibn Qayyim, Zād al-Ma'ād, vol. IV, pp.116-119, cf; Ibn Rajab, al-Qawā'id, p.388.

⁵⁵Al-Sijistānī, Sunan Abu Dā'ūd, vol. I, p. 281, Ibn Qayyim, Zād al-Ma'ād, vol. IV, p.121, al-Bayhaqī, al-Sunan al-Kubrā, vol. X, p.262, al-Turkumānī, al-Jawhar al-Naqī printed together with al-Bayhaqī, al-Sunan al-Kubrā, vol. X, pp. 262-265.

has alienated the child from his colleagues through his intercourse. However, whichever one of them really was the father cannot be properly determined. Therefore, when the lot brings the child to one of them, he thereby alienates the child from his colleagues. It is, for the other two, as if the child had been killed by the former. The three stand as one father. Therefore, the portion of the bloodwit paid to the killer (*ḥiṣṣat al-mutlif*), is one third of the bloodwit (*diyyah*), as the child belongs to him. He will pay to each of his colleagues what has been specified, i.e., one third of bloodwit (*diyyah*).⁵⁶

However, the other view on this matter holds that it is as if he has destroyed the child by his intercourse as far as his two colleagues are concerned and the child belongs to him. Therefore, the winner of the lottery is liable to pay compensation (*damān*) of the child's cost; and the cost of the child according to Islamic law is his bloodwit (*diyyah*). As a result, he is liable for the payment of two thirds of *diyyah*. This rule is applied to someone who killed (*itlāf*) a slave owned by himself and two other partners. Thus, the one who killed the slave was liable to pay two thirds of *diyyah* to the other two colleagues. Thus the use of the lottery to determine paternity of the child is made analogous to the killing of a slave owned by three partners.⁵⁷

⁵⁶Ibn Qayyim, *Zād al-Ma'ād*, vol. IV, p. 121, cf; Ibn Rajab, *al-Qawā'id*, p. 377 and 388.

⁵⁷Ibn Qayyim, *Zād al-Ma'ād*, vol. IV, p. 121, cf; Subḥī Maḥmaṣṣānī, *Turāth Khulafā'*, p. 372, al-Sarakhsī, *al-Mabsūṭ*, vol. XV, p. 4 and vol. XVII p. 70, al-Shāfi'ī, *al-Umm*, vol. VII p. 164, *Sunan Abū Dā'ūd*, vol. II, p. 281, Ibn Qayyim, *I'lām al-Muwaqqā'in*, vol. II, p. 18.

V. CONCLUSION

Although Islām had abolished the pre-Islamic institution of adoption, it provided through *istilhāq* an alternative to it so that a foundling could gain a legitimate *nasab* and all the privileges and rights involved in that. Even though *istilhāq* was considered in moral terms to be something which should only take place if it was true, in fact the jurists elaborated its rules in such a way as to show that the moral consideration was a personal matter. They were only concerned to establish that the legitimate paternity of the father was possible. In cases of dispute over paternity where there was a possibility of doubt, physiognomy could be used to establish paternity. In the last resort the drawing of lots was allowed.

FINAL CONCLUSIONS

A legitimate nasab is very important for a child in Islām. Legitimacy arises out of a child being born in a sound marriage or as an acknowledged child of a slave-woman (*milk al-yamīn*). The doctrine of al-walad li-al-firāsh established legitimacy, whatever may have been the actual circumstances of the marriage, provided that the husband or owner was prepared to acknowledge the child. When a child is born and the husband is unaware of his wife's pregnancy, the wife must provide witness, according to the jurists, to assume the husband that she actually did give birth to the child. Legitimacy can also be allowed in cases where conception has taken place as a result of unlawful intercourse which has taken place without the knowledge of the partners that their intercourse was unlawful. Legitimacy brought rights and privileges to the child. The father had the duty of providing for the child's maintenance and upbringing. He was responsible for his/her protection as the walī and would claim diyyah if the offspring suffered any harm. Also, the father, would be responsible for the diyyah if the offspring committed any harm to anyone else. Legitimacy also conferred rights of inheritance under the prescribed terms of inheritance. The father of a legitimate female would also be responsible for her marriage as her walī.

Illegitimacy is established as the result of zinā. In most cases, this would seem to apply to a woman who was not married as a child born to a married woman as the result of zinā could still preserve his/her legitimacy under the

doctrine of al-walad li-al-firāsh. However, if the husband believed that the child was not his, he could disown the child through li'ān.

An illegitimate child suffered many disadvantages. All the rights of the illegitimate child were separated from the father and the child was totally dependent on his/her mother, who, in turn, had to look to her own family to give protection to her. This may not always have been forthcoming as a result of her zinā (fornication or adultery). The illegitimate child also suffered from both legal and social disadvantages. There was a strong feeling among the jurist that the illegitimate child was not allowed to lead the prayer. There was also some doubts about the acceptability of the testimony of a walad zinā.

To avoid accusation of zinā, parents might well leave their child to be looked after by someone else. However, poverty could also be another reason for abandoning a child. The classical jurists in dealing with the problems of a foundling, have shown themselves to be concerned to protect as far as possible the situation of the foundling. They have presumed the foundling to be free and where possible, a Muslim and they have gone out of their way to ensure, within their legal structure, the well-being and good upbringing of the foundling. The procedure which the jurists adopted as far as the relationship between the state and the foster family was that it was the duty of the finder to bring the child to the authorities. Then the authorities would find someone to look after the foundling, usually the finder but not always. The authorities had to ensure that

the person would be an appropriate person to look after the foundling. The financing of the maintenance of the child could be taken over by the foster-father and this was recommended, particularly as an act of charity. However, provided the foster father made it clear from the beginning that he would expect to be repaid the costs of the maintenance of the child when that child became an adult, he could reclaim, at the appropriate time, provided they could actually be repaid. However, it was ultimately the state's responsibility to provide the foster father with the means to provide for the child. The state generally seems to have retained the walā' of the child, though this may not have always been the case. Thus, it was the state that would normally be responsible for the bloodwit of the foundling. It would be the state probably in the person of qāḍī who would act as the walī in the marriage of a female foundling. The state would also be entitled to inherit from the foundling, when the foster father receives the walā' of the foundling, the same would apply to him and his family as it did to the state.

This relationship is legally not adoption, the relationship between the foundling and the family is not governed by the same rules as the relationship would if the foundling had been a legitimate natural child of the family. Thus, the foundling has no rights of inheritance or impediments to marriage. There was one means by which the foster father or any of the foster family, who had grown to love and care for their foster child, could make provision for the child to inherit and that was by waṣiyyah, namely up to a third of the property left could be bequeathed to the foster child so that the assigned shares of inheritance would

be somewhat reduced.

The legal status of the foundling was under the state. This meant that the foundling was deprived of any nasab, whether legitimate or illegitimate. In pre-Islamic Arabia adoption provided a child with all the advantages of a legitimate nasab. However, Islām abolished such a forms of adoption. The only way a foundling could acquire a legitimate nasab was his/her parents to claim (*istihāq*) that it was their child born in a legitimate marriage. The Islamic jurists warn again making false claims but were really only concerned in a very loose fashion to establish that such a claim was true. Thus, in effect, they were replacing adoption by *istihāq*. Finally, it can be said that Islamic law tends to want to establish legitimacy by making it as easy as possible under the terms of *al-walad li-al-firāsh* and *istihāq*. When this was not possible, the jurists put the duty of care and maintenance on the mother's family. When this was not possible, it became the duty of the state.

APPENDIXDOUBTFUL PARENTHOOD RELATING TO CHILDREN IN THE ISLAMIC
FAMILY LAW ACT 1984 (ACT 303) - MALAYSIA**Brief Background**

Malaysia Federal Constitution states:

'Except with respect to the Federal Territory, Islamic Law and personal and family law of a person professing the religion of Islam, including the Islamic law relating to succession, tetate, and intestate, bethrothal, marriage divorce, dower, maintenance, adoption, legitimacy, guardianship, giftsthe determination of matters of Islamic law and doctrine Malcy custom'.¹

The administration of Islamic law in Malaya is promulgated through the adoption of Mohammadan Marriage Ordinance 1880, 1908, 1909 and 1923 under the supervision of British Colonial Office.² The administration of Islamic law including Islamic family law in the states of Malaysia has undergone many alteration and changes in order to suit the needs of the Muslim in Malaysia. Each state in Malaysia has its own enactment relating to the administration of

¹*Malaysia Federal Constitution* Ninth Schedule list II, cf., David C. Buxbaum, *Family Law and Customary Law in Asia*, p. 109.

²Ahmad Ibrahim, 'Ke Arah Penyelarasan Undang-Undang Islam di Malaysia' (Towards Unification of Islamic Law in Malaysia), in *Jurnal Hukum*, vol. V, section II, 1987, pp.241-272.

Islamic law. For example, The Enactment of Administration of Islamic law, the State of Selangor, 1952 is for Selangor state and the Enactment of Administration of Islamic Law, Federal Territories is for Kuala Lumpur, Gombak, Cheras and all zones under the Federal territories.

Thus, the provisions and acts of Muslim family law in Malaysia relating to marriage and divorce slightly vary in all thirteen states in Malaysia. However, the teaching of the Shafi'i school of law has been adopted with some modifications to apply Muslims in Malaysia. This appendix examines the provision of Islamic Family law relating to matters we discussed in the thesis: [i] legitimacy [ii] illegitimacy, [iii] acknowledgment of paternity (*istilhāq*) and; [iv] foundling and adoption.

(i) Child's Legitimacy in Islamic Family Law (Federal Territories) Act 1984 (Act 303)

As we have discussed earlier, the child's legitimacy is based on the doctrine *al-walad li-al-firāsh*, proof (*bayyinah*), problematic intercourse (*waṭ' shubhah*) and the acknowledgement of paternity. However, the provisions of the act regarding a child's legitimacy in Islamic Family Law, do not include all modes which were discussed in the thesis. The Act provides for the child's legitimacy as follows:

[a] The child born to a woman should be regarded as legitimate when the conception has taken place more than six months after the marriage or a maximum of four years after the dissolution of the marriage. The child's legitimacy has been described in the *Islamic Family Law* (Federal Territories) Act 1984 (Act 300) as follows:

*'Where a child is born to a woman who is married to a man more than six qamariyyah (lunar) months from the date of the marriage or within four qamariyyah years after dissolution of the marriage either by the death of the man or by divorce, the woman not having remarried, the nasab or paternity of the child is established in that man...'*³

This provision is clearly similar to the view of the Shāfi'ī school of law and the doctrine of al-walad li-al-firāsh is clearly established.

[b] As far as the child arising out of problematic intercourse (waṭ' shubhah), the family law act does not explain the meaning of problematic intercourse (waṭ' shubhah). It should be assumed that waṭ' shubhah refers to any carnal relationship between a man and a woman other than adultery and fornication (zinā). However, in general the child arising out from waṭ' shubhah is regarded as established so long as the conception takes place within six months or four qamariyyah years. The *Islamic Family Law*, provides the following:

'Where a man has shubhah sexual intercourse with a woman, and she is subsequently delivered of a child between the period of six qamariyyah months to four qamariyyah years after the intercourse, the paternity of

³*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 110.

the child shall be ascribed to the man'.⁴

[c] The acknowledgement of paternity (*istilhāq*) in the Islamic Family Law in Malaysia.

We discussed earlier that *istilhāq* or *iqrār* is the only possible way to establish the abandoned child as legitimate. The Islamic Family law gives detailed rules regarding the acknowledgement of paternity which follow the discussion in the thesis. They are as follows:

'Where a man acknowledges another, either expressly or implicitly, as his lawful child, the paternity of the child shall be established in the man, if the following conditions are fulfilled, that is to say:

- (a) the paternity of the child is not established in anyone else;*
- (b) the ages of the man and the child are such that filial relationship is possible between them;*
- (c) where the child is of discrete age, the child has acquiesced in the acknowledgement;*
- (d) the man and the mother of the child could have been lawfully joined in marriage at the time of conception;*
- (e) the acknowledgement is not merely that he or she is his son, but the child is his legitimate son;*
- (f) the man is competent to make a contract;*
- (g) the acknowledgement is with the distinct intention of conferring the status of legitimacy;*
- (h) the acknowledgement is definite and the child is acknowledged to be the child of his body'.⁵*

⁴*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 113.

⁵*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 114.

The provision in this act insist that once the acknowledgement is made, it could not be rebutted unless there are certain conditions which make the relationship between the claimant and the acknowledged child impossible. This would take place if:

- (a) disclaimer on the part of the person acknowledged;
- (b) proof of such proximity of age, or seniority of the acknowledgee, as would render the alleged relationship physically impossible;
- (c) proof that the mother of the acknowledgee could not possibly have been the lawful wife of the acknowledgor at the time when the acknowledgee could have been conceived".⁶

Further, acknowledgement made by a woman observing *'iddah* is regarded as established so long as the acknowledgement made by her is confirmed by the husband or through evidence. The *Islamic Family Law* states:

'Where the acknowledgor is a woman who is married or who is observing the *'iddah*, the paternity of the person acknowledged shall not be ascribed to her husband unless her acknowledgement is confirmed by him or by evidence'.⁷

Although the child should be regarded as legitimate either through confirmation by the husband or evidence. The *Islamic Family Law* does not clearly mention the meaning of evidence. Presumably the evidence requires in this provision is two women as witnesses to the birth. This is because according

⁶*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 115.

⁷*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 116.

to the Shāfi'ites, the requirement of witnesses relating the child's delivery is two women.

It is worth mentioning, the provision not only allows the claimant who is older to acknowledge such a child, the child may also be allowed to acknowledge another as his/her parents so long as there is a possibility in terms of age. The *Islamic Family Law* states:

'Where a person acknowledges another as his father or mother, the acknowledgement, if assented to or confirmed by the acknowledgee whether during the life time or after the decease of the acknowledgor, shall constitute a valid relationship, in so far as the parties themselves are concerned, provided that the ages of the acknowledgor and the acknowledgee are such that filial relationship is possible between them'.⁸

This is clearly in accordance with the view of the Shāfi'ites and most of the jurists. The *Islamic Family Law* goes as far as allowing a person other than a son/daughter to acknowledge another as his/her mother/father so long as the latter confirms the acknowledgement. The *Islamic family Law* provides:

'Where a person acknowledges another as a relation other than as a son, mother, or father, the acknowledgement shall not effect any other person unless that other person confirms the acknowledgement'.⁹

Thus, so long as the acknowledgement of paternity is made, it is

⁸*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 117.

⁹*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 118.

irrevocable. The *Islamic Family Law* states:

'Once acknowledgement or confirmation has been made in respect of paternity or relationship, the acknowledgement or confirmation shall become irrevocable'.¹⁰

(ii) The child's illegitimacy

Some of the features of the illegitimacy, i.e., li^cān and maintenance and care of the illegitimate child are provided for in the Act. The *Islamic Family Law* provides that if the child delivered by that woman has been disowned by the husband through the process of li^cān before the court, the child should be regarded as illegitimate and could not be regarded as established from him. The *Islamic Family Law* clearly states;

'...but the man may, by way of li^cān or imprecation, disavow or disclaim the child before the Court'.¹¹

Further, as far as a child's born more than four years after the dissolution of the marriage is concerned, the child's legitimacy is not established from the former husband and the child is regarded as illegitimate. The *Islamic Family Law* says:

'Where the child is born more than four qamariyyah years after the dissolution after the marriage either by the death of the man or by divorce

¹⁰*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 119.

¹¹*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 110.

, the paternity of the child shall not be established in the man unless he or any of his heirs asserts that the child is his issue'.¹²

Similarly if the birth of the child takes place after declaration of completion of the *'iddah*, the child would also be regarded as illegitimate. However, if the child is born within less than four lunar years, the child may be regarded as legitimate. The *Islamic Family Law* provides:

'Where a woman, not having remarried, makes a declaration that the period of 'iddah has been completed, whether the period is for death or divorce, and she is subsequently delivered of a child, the paternity of the child shall not be ascribed to her husband unless the child was born less than four qamariyyah years from the death of the dissolution of the marriage either by the death of the husband or by divorce'.¹³

In one case, a woman who had been accused of committing *zinā* had been brought to the court. In the court, she had confessed that she committed *zinā* and had delivered a child but she had given the child born to her to someone else for upbringing. The penalty in such a case is either to pay a fine of RM300 or three months imprisonment. She chose to pay the fine.¹⁴ The maintenance of illegitimate child could be provided by the court and the court could require the woman to provide the child's maintenance in terms of what it considered reasonable. This is laid down by the *Islamic Family Law* which clearly states:

¹²*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 111.

¹³*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 112.

¹⁴*Jurnal Hukum*, vol. V, section II, Shawwāl 1407AH/1987, pp. 321-325.

'If a woman neglects or refuses to maintain her illegitimate child who is unable to maintain himself or herself, other than a child born as a result of rape, the court, upon due proof thereof, may order the woman to make such monthly allowance as the Court think reasonable'.¹⁵

'A monthly allowance under this section shall be payable from the date of the commencement of the neglect or refusal to maintain or from such later as may be specified in the order'.¹⁶

This provision is in accordance with the view of the Islamic law which requires the mother to be responsible to provide maintenance of the illegitimate child. The care of the child would also be held as the responsibility of the mother. *The Islamic Family Law* provides the following:

'The custody of illegitimate children appertains exclusively to the mother and her relations'.¹⁷

(iii) Foundling and Adoption in Malaysia

In Malaysia, cases of abandoned children have come to the attention of a public during last six years. It is not suprising to read in the newspaper that an infant has been found dead, abandoned on the street or in the toilet or in other places. So far, the reasons of such abandonment have not been identified as there has not been sufficient research carried out. However, public opinion

¹⁵*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 80.

¹⁶*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 80.

¹⁷*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 85.

tends to regard such a child as illegitimate though they have no proof for that. Normally, in such a case, a person who finds a dead infant will make report to the authorities. The Police authority will contact the Social Welfare Department and the officer in charge accompanying by a Doctor will examine that the child is in a good health. After it has been confirmed that the child is healthy, the authority from social welfare would then ask the finder whether he/she would like to adopt the child. In normal circumstances, after having been permitted by the authority, the finder would be allowed to raise him/her as a foster family and the child is adopted by the finder. However, if the finder refuses to raise him/her as an adopted child, the authority will take it to the social welfare office and the welfare officer will take it to the orphanage. The Department of Social Welfare in Malaysia has to provide for the maintenance of the child until the child attains the age of puberty.

The process of adoption takes place officialy or unofficially. Unofficial adoption means that the abandoned child is raised by the foster family as separate from the family and registered in a birth certificate as say, °Abd al-Rahīm b. °Abd Allāh (the slave of Allāh). This is particularly if the foster family is a Muslim. This means that the child should be regarded as majhūl al-nasab. However, if the foster family wishes to register him/her as the family member, there is no restriction for that. The Adoptin Act of 1952 in Malaysia, is not part of the Islamic family law. The provisions allow anyone to register a child as his own child. In the case of death in the adopting family, the adopted child is

allowed to receive inheritance. The Adoption Act 1952 clearly states that an adopted child should be regarded as legitimate if the child has been registered according to its provisions.

As far as the maintenance of the abandoned child is concerned, there has been no specific provision in the *The Islamic Family Law* as to who is to be held responsible in providing for maintenance. However, as we discussed earlier, in practice, the Department of Social Welfare plays an important role to overcome this kind of problem particularly if the finder refuses to take him/her as an adopted child. Thus, it is acting like *bayt al-māl* or the state as described by the jurists. There is a provision stating that in the case of the child has no legal guardian, the court on its jurisdiction could appoint a person or body to look after the child's welfare. This has been stressed by *The Islamic Family Law* which says:

(1) 'In the absence of the legal guardians, the duty of appointing a guardian for the protection and preservation of the minor's property shall be upon the Court, and in making an appointment the Court shall be guided chiefly by considerations of the minor's welfare'.¹⁸

(2) 'In considering what will be for the welfare of the minor, the Court shall have regard to the age and sex of the minor, the character and the capacity of the proposed guardian and his nearness of relationship of the minor, the wishes, if any, of the deceased parents, and any existing or previous relations of the proposed guardian with the minor or his property, and where the minor is old enough to form an intelligent

¹⁸*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 90.

preference, the Court may consider that preference'.¹⁹

From the course of the discussion, the problems of doubtful parenthood relating to children in Malaysia, some of the provisions, particularly in *The Islamic Family Law Act, Federal Territories, Malaysia*, is in accordance with the spirit of the view of the Shafi'i school of law. However, there is no provision for the *laqīṭ* enacted in the *Islamic Family Law Act*. In practice, the Social Welfare Department takes charge of it. Finally, adoption is under the jurisdiction of civil laws and does not properly conform to the Islamic prohibition of adoption (*tabanni*).

¹⁹*Islamic Family Law* (Federal Territories) Act 1984 (Act 303), Art. 90.

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